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Chief Justice Roberts
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590 U.S. ___ ,140 S. Ct. 1498, 206 L. Ed. 2d 732

# VIRGINIA MODEL JURY INSTRUCTIONS

*Civil*

2021-2022 Edition

## Virginia Model Jury Instructions Committee
## Appointed by the Chief Justice

**PUBLICATION UPDATE**

**Route to:** ☐ ____ ☐ ____ ☐ ____ ☐ ____
☐ ____ ☐ ____ ☐ ____ ☐ ____

# Virginia Model Jury Instructions—Civil

Publication 67950 Release 22 March 2022

## HIGHLIGHTS

**2021 Updates**

- The 2021–2022 Annual Edition includes the 2021 updates of **Virginia Model Jury Instructions — Civil.** Updated and revised to incorporate important developments during the past year, the *Model Jury Instructions — Civil* provide comprehensive, authoritative coverage of Virginia civil law. Many instructions have been revised, along with accompanying Sources & Authority.
- Release 22 includes **Virginia Model Jury Instructions — Civil on E-file.** The companion Jury Instructions on E-file facilitates quick, efficient drafting and preparation of jury communication language.

## REVISED INSTRUCTIONS

**4.025** Single, Indivisible Injury

**5.000** Definition of Proximate Cause

**5.005** Multiple Proximate Causes

**6.060** Contributory Negligence: Right to Assume Ordinary Care

**9.040** Aggravation of Injuries by Health Care Provider

**10.080** Speed: Exceeding Posted Limit

**10.190** Stopping and Turning: Duty to Signal

**11.020** Certain Traffic Regulations: Operator Entitled to Sovereign Immunity

**12.000** School-Bus Driver's Duty to Use Warning Device

**14.030** Pedestrian's Right-of-Way at Marked Crosswalk, Regular Crossing, or at Intersection Where Speed

Limit Is Not More Than 35 m.p.h.

**19.020** Railroad's Duty: Anticipated Trespassers on Tracks

**34.000** Definition of Warranty

**34.040** Implied Warranty: Fitness for a Particular Purpose

**34.050** Implied Warranty: Fitness for a Particular Purpose—Reliance

**34.076** Unreasonably Dangerous Product

**34.080** Unreasonably Dangerous or Not Fit for the Purpose for Which It Is Ordinarily Used [Merchantability: Allergic Users]

**34.140** Manufacturer's Duty: Design and Construction

**34.190** Unsafe Use of Product

**35.010** Statewide or Local Standard of Care for Health Care Providers

**37.010** Liability Issues (Public Figure / Not Defamatory *Per Se* or Private Figure/Substantial Danger to Plaintiff's Reputation Not Apparent)

**37.095** Finding Instruction (for use with Instruction No. 37.010)

**44.010** Accord and Satisfaction — Uniform Commercial Code

**45.400** Material Breach of Contract

**45.440** Preventing Performance

**45.560** Buyer's Damages: Breach of Contract to Sell Property

**46.010** Just Compensation: No Damage to Residue

**46.020** Just Compensation: Damage to Residue and No Enhancement

**47.130** Recovery Under the Policy: Burden of Proof

**49.000** "Sexually Violent Predator" — Finding Instruction

## NEW INSTRUCTIONS

**47.125** Renewal Policy: Acceptance

## RE-NUMBERED INSTRUCTIONS

**47.600** Renewal Policy: Acceptance, re-numbered as new Instruction No. 47.125 Renewal Policy: Acceptance

## WITHDRAWN INSTRUCTIONS

**34.160** Manufacturer's Duty: Inspect or Test

**47.610** Policy Coverage: Burden of Proof

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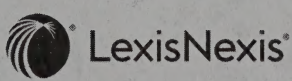

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# *Table of Contents*


**Chapter 1 HOW TO USE THIS BOOK**

(1) Model Instructions—Edition Preparation and Updating
(2) Model Instructions—Format and Use
(3) Summary of Contents—Civil Volume
(4) Jury Instructions—General Role and Limitations
(5) Special Considerations Applicable to Jury Instructions in Civil Cases
(6) Sample Instruction
Instruction No. 10.090 (Sample Form) Speed: Posted Minimum Speed
(7) Hypothetical Case

**Chapter 2 GENERAL INSTRUCTIONS**

Instruction No. 2.000 Preliminary Instructions to Jury
Instruction No. 2.020 Credibility of Witnesses
Instruction No. 2.030 Adverse Witness
Instruction No. 2.040 Expert Witness
Instruction No. 2.060 Party Bound by His Own Testimony
Instruction No. 2.080 Unexplained Failure to Produce Important Witness
Instruction No. 2.090 Jury View
Instruction No. 2.100 Circumstantial Evidence
Instruction No. 2.130 Prior Inconsistent Statement by Witness
Instruction No. 2.135 Prior Inconsistent Statement by Party
Instruction No. 2.140 Prior Conviction of Felony or Crime Involving Moral Turpitude
Instruction No. 2.170 Rejected and Stricken Evidence
Instruction No. 2.180 Amount Sued for Is Not Evidence
Instruction No. 2.190 Peremptory Instruction
Instruction No. 2.200 Effect of Defendant Admitting Liability
Instruction No. 2.210 Effect of Judge Striking Defense
Instruction No. 2.220 Verdict Not to Be Based on Sympathy, Bias, Guesswork, or Speculation
Instruction No. 2.240 Verdict Against an Estate: Dead Man's Act
Instruction No. 2.250 Unanimous Verdict: "*Allen* ["*Titcomb*"] Charge"

**Chapter 3 ISSUES, BURDEN OF PROOF AND FINDING INSTRUCTIONS**

Instruction No. 3.000 Negligence: Issues and Allocation of Burdens of Proof
Instruction No. 3.050 Finding Instruction
Instruction No. 3.060 Finding Instruction: Multiple Defendants
Instruction No. 3.100 Standard of Proof: Definition of Greater Weight of the Evidence

Instruction No. 3.110 Standard of Proof: Definition of Clear and Convincing Evidence

**Chapter 4 NEGLIGENCE**

Instruction No. 4.000 Definition of Negligence
Instruction No. 4.010 Burden of Proof
Instruction No. 4.015 Fact of Accident Is Not Proof of Negligence
Instruction No. 4.018 Foreseeable Consequences
Instruction No. 4.020 Concurring Negligence
Instruction No. 4.025 Single, Indivisible Injury
Instruction No. 4.030 Definition of Gross Negligence
Instruction No. 4.040 Definition of Willful and Wanton Conduct

**Chapter 5 CAUSATION**

Instruction No. 5.000 Definition of Proximate Cause
Instruction No. 5.005 Multiple Proximate Causes
Instruction No. 5.010 Definition of Superseding Cause

**Chapter 6 CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK**

Instruction No. 6.000 Definition of Contributory Negligence
Instruction No. 6.005 Child Under Seven Incapable of Contributory Negligence
Instruction No. 6.010 Duty to Children Under Fourteen Years of Age
Instruction No. 6.020 Negligence of Child of Seven Years Old or Older But Less than Fourteen
Instruction No. 6.030 Standard of Conduct for Minor of Fourteen Years Old or Older But Less than Eighteen
Instruction No. 6.040 Contributory Negligence: Burden of Proof
Instruction No. 6.050 Contributory Negligence: Parties' Negligence Not Compared
Instruction No. 6.055 Contributory Negligence: Availability of Defense (Willful and Wanton)
Instruction No. 6.060 Contributory Negligence: Right to Assume Ordinary Care
Instruction No. 6.100 Definition of Assumption of the Risk
Instruction No. 6.110 Assumption of the Risk: Burden of Proof

**Chapter 7 SPECIAL NEGLIGENCE DOCTRINES**

Instruction No. 7.000 Sudden Emergency
Instruction No. 7.005 Medical Emergency
Instruction No. 7.010 Negligent Entrustment
Instruction No. 7.020 Rescue
Instruction No. 7.030 Last Clear Chance: Helpless Plaintiff

Instruction No. 7.040 Last Clear Chance: Inattentive Plaintiff
Instruction No. 7.050 Res Ipsa Loquitur

**Chapter 8 AGENCY, EMPLOYMENT AND SIMILAR RELATIONSHIPS**

Instruction No. 8.000 Definition of Employer and Employee
Instruction No. 8.010 Employer's Liability for Employee's Negligence
Instruction No. 8.020 Issues and Allocation of Burden of Proof
Instruction No. 8.030 Scope of Employment—Presumption and Burden of Production
Instruction No. 8.040 Scope of Employment
Instruction No. 8.050 Scope of Employment: Multiple Motives
Instruction No. 8.060 Scope of Employment: Intentional Acts
Instruction No. 8.070 Employer's Liability for Acts of Employee's Assistant
Instruction No. 8.080 Special Employer Liable for Acts of Borrowed Employee
Instruction No. 8.100 Definition of Independent Contractor
Instruction No. 8.110 Principal Not Liable for Acts of Independent Contractor
Instruction No. 8.120 Definition of Business Joint Venture: Liability of Co-Venturers
Instruction No. 8.130 Definition of Non-Business Joint Enterprise: Liability of Participants
Instruction No. 8.140 Joint Enterprise: Right of Control
Instruction No. 8.150 Definition of Partnership: Liability of Partners

**Chapter 9 DAMAGES**

Instruction No. 9.000 General Personal Injury and Property Damage
Instruction No. 9.010 Reasonable Proof
Instruction No. 9.015 Collateral Source Rule
Instruction No. 9.020 Duty to Mitigate Damages
Instruction No. 9.030 Aggravation of Pre-Existing Condition
Instruction No. 9.040 Aggravation of Injuries by Health Care Provider
Instruction No. 9.050 Property Damage: Total Loss—Diminution in Value Measure of Damages
Instruction No. 9.060 Property Damage: Partial Loss—Cost of Repairs Measure of Damages
Instruction No. 9.070 Property Damage: Partial but Disputed Loss—Measure of Damages
Instruction No. 9.080 General Punitive Damages
Instruction No. 9.090 Punitive Damages: Definition of Common Law Actual Malice
Instruction No. 9.100 Damages: Death by Wrongful Act
Instruction No. 9.105 Punitive Damages: Death by Wrongful Act
Instruction No. 9.110 Contributory Negligence of Beneficiary: Death by Wrongful Act
Instruction No. 9.120 Life Expectancy/Mortality Table

**Chapter 10 MOTOR VEHICLES—OPERATION**


| | |
|---|---|
| Instruction No. 10.000 | Lookout; Control; Speed |
| Instruction No. 10.004 | Duty of Driver Following Another Vehicle |
| Instruction No. 10.005 | Rear-End Collision: Finding Instruction |
| Instruction No. 10.010 | Right to Assume Other Driver's Ordinary Care |
| Instruction No. 10.020 | Lookout: Scope of Duty to Keep a Proper Lookout |
| Instruction No. 10.025 | Lookout: Duty to Keep Windows Clear |
| Instruction No. 10.030 | Lookout: When Lights to Be Lighted |
| Instruction No. 10.040 | Control: Skidding |
| Instruction No. 10.050 | Control: Continuous Driving Over 13 Hours |
| Instruction No. 10.060 | Control: Falling Asleep |
| Instruction No. 10.070 | Control: Brake Requirements |
| Instruction No. 10.080 | Speed: Exceeding Posted Limit |
| Instruction No. 10.090 | Speed: Posted Minimum Speed |
| Instruction No. 10.100 | Speed: Driving Too Slowly |
| Instruction No. 10.105 | Speed: Table of Speed and Stopping Distances |
| Instruction No. 10.110 | Duty to Drive on the Right |
| Instruction No. 10.115 | Defendant in Plaintiff's Lane of Travel |
| Instruction No. 10.120 | Proper Lane for Slow-Moving Vehicle on Multiple-Lane Road |
| Instruction No. 10.130 | Duty to Drive on Half of the Road |
| Instruction No. 10.140 | Duty to Heed Lane Markings |
| Instruction No. 10.150 | Three-Lane Roads |
| Instruction No. 10.160 | Changing Lanes |
| Instruction No. 10.170 | Overtaking and Passing: Visibility |
| Instruction No. 10.180 | Overtaking and Passing: Clearance |
| Instruction No. 10.190 | Stopping and Turning: Duty to Signal |
| Instruction No. 10.200 | Turn or Stop Signal |
| Instruction No. 10.210 | Changing Course After Signaling |
| Instruction No. 10.230 | Right Turn: Driver's Duty |
| Instruction No. 10.240 | Driver's Duty When Turning Left; Yielding Right-of-Way |
| Instruction No. 10.250 | Driver's Duty on Left Turn From a Two-Way Road |
| Instruction No. 10.260 | Driver's Duty on Left Turn on Other Than Two-Way Roadways |
| Instruction No. 10.262 | Steady Red Light |
| Instruction No. 10.264 | Green Light |
| Instruction No. 10.266 | Steady Amber Light |
| Instruction No. 10.268 | Right Turn on Steady Red Light |
| Instruction No. 10.270 | Stop Sign: Yielding Right-of-Way |
| Instruction No. 10.280 | Yield Sign at Intersection: Yielding Right-of-Way |
| Instruction No. 10.290 | Uncontrolled Intersection: Yielding Right-of-Way |
| Instruction No. 10.295 | Unlawful Speed: Forfeiture of Right-of-Way |

Instruction No. 10.300 Right-of-Way: Stopping and Yielding Before Entering Highway or Crossing Sidewalk
Instruction No. 10.310 Right-of-Way: Traffic Circles
Instruction No. 10.320 Driver's Duty Not to Stop on Highway
Instruction No. 10.330 Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway
Instruction No. 10.340 Driver's Duty When Stopping to Sell Merchandise
Instruction No. 10.350 Driver's Duty When Stopping on Highway Because of Accident
Instruction No. 10.360 Certain Stopped Vehicles; Duty to Set Out Warning Devices

**Chapter 11 MOTOR VEHICLES—EMERGENCY VEHICLES**

Instruction No. 11.000 Standard of Care: Operator Entitled to Sovereign Immunity
Instruction No. 11.005 Standard of Care: Operator Not Entitled to Sovereign Immunity
Instruction No. 11.010 Speed Limits: Operator Entitled to Sovereign Immunity
Instruction No. 11.020 Certain Traffic Regulations: Operator Entitled to Sovereign Immunity
Instruction No. 11.030 Driver's Duty to Yield to Emergency Vehicle
Instruction No. 11.035 Driver's Duty to Make Lane Change

**Chapter 12 MOTOR VEHICLES—SCHOOL BUSES**

Instruction No. 12.000 School-Bus Driver's Duty to Use Warning Device
Instruction No. 12.010 School-Bus Driver's Duty When Picking Up or Discharging Students
Instruction No. 12.030 Stopping on Highway to Pick Up or Discharge Students Permitted
Instruction No. 12.040 Duty of a Driver Approaching School Bus That Is Stopped to Pick Up or Discharge Students
Instruction No. 12.050 Duty of Driver Approaching School Bus Stopped for Another Reason
Instruction No. 12.060 Approaching Driver's Duty of Care
Instruction No. 12.070 Approaching Driver Has No Duty to Stop: Divided Highway

**Chapter 13 MOTOR VEHICLES—PASSENGERS**

Instruction No. 13.000 Passenger's Duty to Warn Driver
Instruction No. 13.010 Passenger's Duty When Getting Out of Vehicle

**Chapter 14 MOTOR VEHICLES—PEDESTRIANS**

Instruction No. 14.000 General Duties of Pedestrian
Instruction No. 14.010 Pedestrian's Duties to Use Sidewalk or Shoulder, or Walk Along Edge of Roadway
Instruction No. 14.020 Pedestrian's Duty Not to Step Into Highway or Street From Behind an Obstruction
Instruction No. 14.030 Pedestrian's Right-of-Way at Marked Crosswalk, Regular Crossing, or at Intersection Where Speed Limit is Not More Than 35 m.p.h.

Instruction No. 14.040 Pedestrian's Duty When Crossing Highway or Street Between Intersections
Instruction No. 14.050 Walk—Don't Walk Signals

**Chapter 15 MOTOR VEHICLES—INTOXICATED DRIVERS**

Instruction No. 15.000 Driving Under the Influence of Intoxicants
Instruction No. 15.005 Punitive Damages: Intoxicated Driver
Instruction No. 15.010 Contributory Negligence: Riding With Intoxicated Driver
Instruction No. 15.020 Assumption of the Risk: Riding With Intoxicated Driver

**Chapter 16 MOTOR VEHICLES—UNINSURED MOTORIST**

Instruction No. 16.000 Issues
Instruction No. 16.010 Finding Instruction

**Chapter 17 MOTOR VEHICLES—EQUIPMENT**

Instruction No. 17.000 Headlights: Requirements
Instruction No. 17.010 Tail Lights: Requirements
Instruction No. 17.020 Brake Lights: Requirements
Instruction No. 17.030 Horn: Requirements
Instruction No. 17.040 Brakes: Requirements
Instruction No. 17.050 Mirrors: Requirements
Instruction No. 17.060 Windshield Wipers: Requirements
Instruction No. 17.070 Flag or Light at the End of Load
Instruction No. 17.080 Projection of Load
Instruction No. 17.090 Airbags

**Chapter 18 RAILROADS—CROSSINGS**

Instruction No. 18.000 Driver's Duty to Look and Listen
Instruction No. 18.010 When Driver Has Duty to Look and Listen for Approaching Trains
Instruction No. 18.020 Driver's Duty to Look and Listen at Crossing Even If There Is No Warning of a Train
Instruction No. 18.030 Passenger's Duty to Look and Listen
Instruction No. 18.040 Driver's Duty While Removing Vehicle From Tracks
Instruction No. 18.050 Driver's Statutory Duty to Stop at Crossing
Instruction No. 18.060 Duty of Driver of School Bus, Vehicle for Hire, or Vehicle Carrying Explosives or Flammables
Instruction No. 18.070 Driver's Duty at Crossing Barrier
Instruction No. 18.080 Railroad's Duty to Sound Whistle, Horn, or Bell
Instruction No. 18.081 Railroad's Duty to Sound Horn

Instruction No. 18.090 Finding Instruction: Comparative Negligence; Railroad's Duty to Sound Warnings at Crossings
Instruction No. 18.100 Railroad's Common Law Duty to Warn That Train Is Approaching Crossing
Instruction No. 18.110 Positive and Negative Testimony
Instruction No. 18.130 Railroad's Duty to Keep Reasonable Lookout
Instruction No. 18.140 Railroad's Train Speed at Grade Crossing
Instruction No. 18.150 Railroad's Train Speed at Grade Crossing: Ordinance
Instruction No. 18.160 Railroad's Duty to Place and Maintain Warning Signal Boards (Crossbucks)
Instruction No. 18.170 Railroad's Duty to Place and Maintain Warning Devices at Crossings
Instruction No. 18.180 Railroad's Duty to Place Warning Devices at Dangerous Crossings
Instruction No. 18.190 Railroad's Duty to Remove Trees and Brush From Right-of-Way
Instruction No. 18.191 Railroad's Duty to Remove Vegetation Obstructing Sightlines
Instruction No. 18.192 Railroad's Duty to Clear Obstructions from Sightlines
Instruction No. 18.200 Railroad's Duty to Keep Crossings in Repair

**Chapter 19 RAILROADS—RIGHT-OF-WAY**

Instruction No. 19.000 Railroad's Duty: Persons on Its Property
Instruction No. 19.010 Railroad's Duty: Identification of Object on Tracks
Instruction No. 19.020 Railroad's Duty: Anticipated Trespassers on Tracks

**Chapter 20 RAILROADS—MISCELLANEOUS**

Instruction No. 20.000 Duty of Initial Carrier to Employee of Consignee
Instruction No. 20.005 Duty of a Delivering Carrier to Employee of Consignee
Instruction No. 20.010 Railroad's Liability for Fires Started by Train

**Chapter 21 RAILROADS—FEDERAL EMPLOYERS' LIABILITY ACT**

Instruction No. 21.000 Railroad's General Duty of Care
Instruction No. 21.001 Degree of Care Varies With Risk Level
Instruction No. 21.010 Causation
Instruction No. 21.015 Aggravation of Pre-Existing Condition
Instruction No. 21.020 Employee's Duty of Care
Instruction No. 21.030 Contributory Negligence: Damages Diminished
Instruction No. 21.040 Violation of Federal Railroad Safety Authorization Act or Other Statute or Regulation Enacted for Safety of Employees
Instruction No. 21.050 Finding Instruction
Instruction No. 21.060 Present Value

**Chapter 22 COMMON CARRIERS**

Instruction No. 22.000 Duty of Care Owed to Passengers Generally
Instruction No. 22.010 Duty of Care Owed to Incapacitated Passengers
Instruction No. 22.020 Duty to Protect Passengers From Assault by Employees
Instruction No. 22.030 Duty to Protect Passengers From Assault by Other Passengers or Strangers
Instruction No. 22.040 Authority to Eject Disorderly Persons
Instruction No. 22.050 Inception of Passenger-Carrier Relationship
Instruction No. 22.060 Termination of Passenger-Carrier Relationship

**Chapter 23 OWNERS AND OCCUPANTS**

Instruction No. 23.000 Definition of Trespasser
Instruction No. 23.010 Definition of Licensee
Instruction No. 23.015 Definition of Bare Licensee
Instruction No. 23.020 Definition of Invitee
Instruction No. 23.030 Invitee's Right to Assume Safe Condition of Premises
Instruction No. 23.040 Occupant's Duty to Invitee: General
Instruction No. 23.050 Occupant's Duty to Invitee: Remove Foreign Objects
Instruction No. 23.060 Occupant's Duty to Social Guest: Activities on Premises
Instruction No. 23.070 Occupant's Duty to Licensee or Social Guest: Condition of Premises
Instruction No. 23.080 Occupant's Duty to Child: Dangerous Instrumentalities
Instruction No. 23.090 Occupant's Duty to Trespasser and Bare Licensee
Instruction No. 23.100 Invitee Exceeding the Scope of Invitation
Instruction No. 23.110 Commercial Occupant's Duty to Remove Snow and Ice After Storm
Instruction No. 23.120 Occupant's Responsibility for Dangerous Substances on Premises
Instruction No. 23.130 Occupant's Duty to Law-Enforcement Officers, Fire Fighters and Other Designated Personnel

**Chapter 24 LANDLORD AND TENANT**

Instruction No. 24.000 Landlord's Duty Upon Surrendering Control
Instruction No. 24.010 Landlord's Duty to Maintain Common Areas
Instruction No. 24.020 Landlord's Liability for Repairs Made
Instruction No. 24.025 Burden of Proving Landlord's Failure to Exercise Reasonable Care in Making Repairs
Instruction No. 24.030 Landlord's Duty to Remove Snow and Ice After Storm
Instruction No. 24.040 Tenant's Liability for Waste
Instruction No. 24.050 Waste: Double Damages

**Chapter 25 HOTELS AND MOTELS**

Instruction No. 25.000 Duty to Provide Accommodations
Instruction No. 25.010 Innkeeper's Duty of Care

**Chapter 26 NUISANCE**

Instruction No. 26.000 Definition of Nuisance
Instruction No. 26.010 Multiple Causes of a Nuisance
Instruction No. 26.020 Definition of Permanent Nuisance
Instruction No. 26.030 Measure of Damages to Property: Permanent Nuisance
Instruction No. 26.040 Measure of Damages to Property: Temporary Nuisance

**Chapter 27 TRESPASS**

Instruction No. 27.000 Definition of Trespass
Instruction No. 27.010 Willful or Not Willful
Instruction No. 27.020 Presumption of Willfulness
Instruction No. 27.040 Damages: Severance of Goods From Land

**Chapter 28 BAILMENTS**

Instruction No. 28.000 Definition of "Bailment," "Bailor" and "Bailee"
Instruction No. 28.010 Bailee's Duty: Mutual Benefit Bailment
Instruction No. 28.020 [RESERVED]
Instruction No. 28.030 Bailee's Duty: Gratuitous Bailment
Instruction No. 28.040 Bailor's Duty: Bailment for Hire or Mutual Benefit
Instruction No. 28.060 Bailee's Negligence Not Imputed to Bailor
Instruction No. 28.070 Issues and Allocation of Burdens of Proof: Contract
Instruction No. 28.071 Issues and Allocation of Burdens of Proof: Tort
Instruction No. 28.080 Finding Instruction: Contract
Instruction No. 28.081 Finding Instruction: Tort

**Chapter 29 ANIMALS**

Instruction No. 29.000 Owner's Duty: Cattle, Horses, and Other Domestic Farm Animals
Instruction No. 29.010 Owner Charged With Knowledge of Propensities of the Breed
Instruction No. 29.020 Dog Owner's Duty: No Leash Ordinance
Instruction No. 29.030 Owner's Duty: Wild Animals
Instruction No. 29.040 Wild Animals: Contributory Negligence

**Chapter 30 DANGEROUS INSTRUMENTALITIES**

Instruction No. 30.000 Dangerous Instrumentalities and Related Activities: General Duty of Care

Instruction No. 30.010 Explosives: Strict Liability for Blasting Damage
Instruction No. 30.030 Electricity and Gas: Duty to Inspect and Repair
Instruction No. 30.040 Electricity: Furnishing Current for Another's Line—Duties to Inspect and Withhold Supply
Instruction No. 30.045 Gas: Furnishing to Another's Pipe—Duties to Inspect and Withhold Supply
Instruction No. 30.050 Electricity: Duty to Insulate Wires

**Chapter 31 MUNICIPAL CORPORATIONS—GENERAL**

**General Liability of Municipal Corporations**

**Chapter 32 MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES**

Instruction No. 32.000 Municipality's Duty: Keep Streets, Sidewalks and Bridges in Safe Condition
Instruction No. 32.010 Municipality's Duty: Warn of Obstruction
Instruction No. 32.020 Pedestrian or Driver Has Right to Assume Reasonably Safe Condition
Instruction No. 32.030 Municipality is Not an Insurer
Instruction No. 32.040 Municipality's Duty: Repair or Warn Upon Notice of Defect
Instruction No. 32.050 Finding Instruction

**Chapter 33 EMOTIONAL DISTRESS**

Instruction No. 33.000 Negligent Infliction of Emotional Distress: Issues
Instruction No. 33.100 Negligent Infliction of Emotional Distress: Finding Instruction
Instruction No. 33.200 Intentional Infliction of Emotional Distress: Issues
Instruction No. 33.300 Intentional Infliction of Emotional Distress: Finding Instruction

**Chapter 34 PRODUCTS LIABILITY**

Instruction No. 34.000 Definition of Warranty
Instruction No. 34.010 Notice of Breach
Instruction No. 34.020 Express Warranty
Instruction No. 34.030 Express Warranty: Creation by Advertisement, Sample or Description
Instruction No. 34.040 Implied Warranty: Fitness for a Particular Purpose
Instruction No. 34.050 Implied Warranty: Fitness for a Particular Purpose—Reliance
Instruction No. 34.060 Implied Warranty: Merchantability
Instruction No. 34.070 Implied Warranty: Merchantability—Labeling; Without Objection in the Trade
Instruction No. 34.075 Breach of Warranty (Negligence) By Seller or Manufacturer
Instruction No. 34.076 Unreasonably Dangerous Product
Instruction No. 34.080 Unreasonably Dangerous or Not Fit for the Purpose for Which It Is Ordinarily Used [Merchantability: Allergic Users]

Instruction No. 34.090 Common Law Implied Warranty: Wholesomeness of Food Products
Instruction No. 34.100 Misuse or Unintended Use
Instruction No. 34.110 Obvious Unfitness (Common Law)
Instruction No. 34.120 Obvious Unfitness: Pre-Contract (Statutory)
Instruction No. 34.130 Obvious Unfitness: Post-Contract (Statutory)
Instruction No. 34.140 Manufacturer's Duty: Design and Construction
Instruction No. 34.150 Manufacturer's and Seller's Duty to Warn: General
Instruction No. 34.155 Manufacturer's Duty to Warn: Medications
Instruction No. 34.160 [RESERVED]
Instruction No. 34.170 Seller's Duty: Inspect or Test
Instruction No. 34.180 Negligence *Per Se* (Example for Pesticide)
Instruction No. 34.190 Unsafe Use of Product
Instruction No. 34.200 Misuse or Unintended Use of Product
Instruction No. 34.300 Motor Vehicle Warranty Enforcement Act: Manufacturer's and Dealer's Duty to Conform to Warranty
Instruction No. 34.310 Motor Vehicle Warranty Enforcement Act: Presumption of Significant Impairment
Instruction No. 34.320 Motor Vehicle Warranty Enforcement Act: Definition of Warranty

**Chapter 35 PROFESSIONAL LIABILITY**

Instruction No. 35.000 Statewide Standard of Care for Health Care Providers
Instruction No. 35.010 Statewide or Local Standard of Care for Health Care Providers
Instruction No. 35.020 Duration of Duty
Instruction No. 35.030 Duration of Duty: Termination of Services by Consent
Instruction No. 35.040 Unsuccessful Outcome Is Not Proof of Negligence
Instruction No. 35.050 Proof of Standard of Care: Expert Testimony
Instruction No. 35.060 Opinion of Medical Malpractice Review Panel
Instruction No. 35.070 Treatment Without Consent
Instruction No. 35.080 Treatment Without Informed Consent
Instruction No. 35.090 Lack of Consent: Emergencies
Instruction No. 35.100 Surgeon's Responsibility in Operating Room
Instruction No. 35.110 Patient's Duty to Mitigate Damages
Instruction No. 35.120 Good Samaritans
Instruction No. 35.130 Duty of Hospitals
Instruction No. 35.200 Duty of Architects
Instruction No. 35.300 Implied Warranty—Construction Contract

**Chapter 36 ASSAULT AND BATTERY**

Instruction No. 36.000 Definition of Battery
Instruction No. 36.010 Definition of Assault
Instruction No. 36.020 Self-Defense

Instruction No. 36.030 Arrest: Permissible Force
Instruction No. 36.040 Arrest: Right to Resist
Instruction No. 36.050 Burden of Proof: No Affirmative Defense
Instruction No. 36.060 Burden of Proof: Affirmative Defense
Instruction No. 36.070 Finding Instruction: Battery—No Affirmative Defenses
Instruction No. 36.071 Finding Instruction: Assault—No Affirmative Defenses
Instruction No. 36.080 Finding Instruction: Battery—Affirmative Defenses
Instruction No. 36.081 Finding Instruction: Assault—Affirmative Defenses
Instruction No. 36.090 Compensatory Damages

**Chapter 37 DEFAMATION**

Instruction No. 37.000 Liability Issues (Public Figure/Defamatory *Per Se*)
Instruction No. 37.010 Liability Issues (Public Figure/Not Defamatory *Per Se* or Private Figure/Substantial Danger to Plaintiff's Reputation Not Apparent)
Instruction No. 37.020 Liability Issues (Private Plaintiff/Danger to Plaintiff's Reputation Apparent)
Instruction No. 37.030 Insulting Words
Instruction No. 37.050 Privilege
Instruction No. 37.060 Merchant: Probable Cause
Instruction No. 37.090 Finding Instruction (for use with Instruction No. 37.000)
Instruction No. 37.095 Finding Instruction (for use with Instruction No. 37.010)
Instruction No. 37.097 Finding Instruction (for use with Instruction No. 37.020)
Instruction No. 37.098 Finding Instruction (for use with Instruction No. 37.020)
Instruction No. 37.100 Actual Damages
Instruction No. 37.105 Presumed Damages
Instruction No. 37.107 Presumed Damages (Public Concern)
Instruction No. 37.110 Punitive Damages (Defamatory *Per Se*)
Instruction No. 37.111 Punitive Damages (Not Defamatory *Per Se*)
Instruction No. 37.120 Mitigation of Damages: Actions Against Newspapers, Magazines, or Periodicals
Instruction No. 37.130 Mitigation of Damages: Apology

**Chapter 38 FALSE IMPRISONMENT**

Instruction No. 38.000 Definition of False Imprisonment
Instruction No. 38.010 Good Faith Not a Defense
Instruction No. 38.020 Lawful Arrest
Instruction No. 38.030 Unnecessary Delay After Arrest
Instruction No. 38.040 Willful Concealment, Shoplifting
Instruction No. 38.045 Probable Cause

Instruction No. 38.060 Burden of Proof: No Affirmative Defense Asserted
Instruction No. 38.070 Burden of Proof: Affirmative Defense Asserted
Instruction No. 38.080 Finding Instruction: No Affirmative Defense Asserted
Instruction No. 38.090 Finding Instruction: Affirmative Defense Asserted

**Chapter 39 FRAUD**

Instruction No. 39.000 Definition of Actual Fraud: Intentional Misrepresentation
Instruction No. 39.010 Definition of Misrepresentation
Instruction No. 39.020 Definition of Material Fact
Instruction No. 39.030 Definition of Reliance
Instruction No. 39.040 Definition of Constructive Fraud
Instruction No. 39.045 Duty to Take Prompt Action
Instruction No. 39.050 Duty to Investigate
Instruction No. 39.060 Fact Versus Opinion
Instruction No. 39.070 Burden of Proof on Common Law Fraud: Clear and Convincing
Instruction No. 39.080 Factors that May Be Considered
Instruction No. 39.090 Finding Instruction Common Law: Actual Fraud
Instruction No. 39.100 Finding Instruction Common Law: Constructive Fraud
Instruction No. 39.110 Finding Instruction Common Law: Actual and Constructive Fraud

**Chapter 40 MISCELLANEOUS TORTS**

Instruction No. 40.100 Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues
Instruction No. 40.150 Wrongful or Tortious Interference with Contract Not Terminable at Will: Finding Instruction
Instruction No. 40.200 Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues
Instruction No. 40.250 Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Finding Instruction
Instruction No. 40.300 Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues
Instruction No. 40.350 Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction
Instruction No. 40.400 False Advertising (Va. Code Ann. § 18.2-216): Issues
Instruction No. 40.450 False Advertising (Va. Code Ann. § 18.2-216): Finding Instruction

**Chapter 41 MALICIOUS PROSECUTION**

Instruction No. 41.000 Definition of Malicious Prosecution
Instruction No. 41.010 Instituting Criminal Proceedings

Instruction No. 41.020 Definition of Malice
Instruction No. 41.035 Lack of Malice
Instruction No. 41.040 Definition of Probable Cause
Instruction No. 41.050 Probable Cause
Instruction No. 41.070 Probable Cause: Willful Concealment or Shoplifting
Instruction No. 41.080 Probable Cause: Advice of Counsel
Instruction No. 41.110 Elements Stipulated or Proved as a Matter of Law
Instruction No. 41.130 Finding Instruction: General
Instruction No. 41.135 Issues and Allocation of Burdens of Proof—Where Defendant Is a Merchant
Instruction No. 41.136 Finding Instruction: Where Defendant Is a Merchant
Instruction No. 41.140 Compensatory Damages
Instruction No. 41.150 Punitive Damages

**Chapter 42 ATTORNEY AND CLIENT**

Instruction No. 42.000 Creation of Attorney and Client Relationship
Instruction No. 42.010 Attorney's Standard of Care
Instruction No. 42.020 Scope of Attorney's Authority
Instruction No. 42.030 Attorney and Client Relationship and Third Parties: Apparent Authority
Instruction No. 42.040 Ratification by Client
Instruction No. 42.050 Dealings Between Attorney and Client
Instruction No. 42.060 Wrongfully Discharged Attorney Entitled to Quantum Meruit

**Chapter 43 BROKERS**

Instruction No. 43.000 General Agency
Instruction No. 43.010 Implied Brokerage Contract
Instruction No. 43.020 Procuring Cause: General
Instruction No. 43.030 Procuring Cause: Known Rival Brokers
Instruction No. 43.040 Procuring Cause: Unknown Rival Brokers
Instruction No. 43.050 Definition of Ready, Willing and Able
Instruction No. 43.060 Broker's Good Faith: Generally
Instruction No. 43.070 Broker's Good Faith: Adverse Interests
Instruction No. 43.080 Seller Not Sole Owner

**Chapter 44 COMPROMISE AND SETTLEMENT**

Instruction No. 44.000 Contractual Settlements
Instruction No. 44.010 Accord and Satisfaction—Uniform Commercial Code
Instruction No. 44.015 Accord and Satisfaction—Non-Uniform Commercial Code
Instruction No. 44.020 Rescission of Agreement for Fraud

Instruction No. 44.030 Compromise Negotiations Are Not Evidence of Liability

**Chapter 45 CONTRACTS**

Instruction No. 45.000 Issues and Burden of Proof
Instruction No. 45.005 Issues and Allocations of Burden of Proof: Third-Party Case
Instruction No. 45.010 Definition of Contract
Instruction No. 45.020 Offer
Instruction No. 45.030 Acceptance
Instruction No. 45.040 Consideration
Instruction No. 45.050 Specified Time for Acceptance
Instruction No. 45.060 No Time Specified for Acceptance
Instruction No. 45.070 Communication of Acceptance
Instruction No. 45.080 Acceptance Must Match Offer
Instruction No. 45.090 Meeting of the Minds
Instruction No. 45.100 Counteroffer
Instruction No. 45.110 Withdrawing an Offer
Instruction No. 45.120 Adequacy of Consideration
Instruction No. 45.130 Performing Prior Legal Duty Not Consideration
Instruction No. 45.140 Past Act Not Consideration
Instruction No. 45.150 Not Suing as Consideration
Instruction No. 45.160 Competence of Parties to Contract
Instruction No. 45.170 Contract Must Be Complete and Reasonably Certain
Instruction No. 45.180 Mutuality of Obligation
Instruction No. 45.190 Intent
Instruction No. 45.200 Express Contract
Instruction No. 45.210 Implied Contract
Instruction No. 45.230 Implied Promise to Pay for Services
Instruction No. 45.300 Contract Construed as a Whole
Instruction No. 45.305 Ordinary Meaning of Words
Instruction No. 45.310 Construction Against the Drafter
Instruction No. 45.320 Contract Interpretation: Ejusdem Generis
Instruction No. 45.330 Practical Construction by the Parties
Instruction No. 45.340 Custom and Usage of Trade
Instruction No. 45.400 Material Breach of Contract
Instruction No. 45.410 Waiver
Instruction No. 45.420 Modification
Instruction No. 45.430 Mutual Rescission
Instruction No. 45.440 Preventing Performance
Instruction No. 45.450 Impossibility as Defense
Instruction No. 45.460 Undue Influence
Instruction No. 45.470 Duress

Instruction No. 45.480 Fraud in the Inducement
Instruction No. 45.500 Damages: Direct
Instruction No. 45.510 Damages: Reasonable Proof
Instruction No. 45.520 Damages: Nominal
Instruction No. 45.530 Damages: Consequential
Instruction No. 45.540 Damages: Liquidated
Instruction No. 45.550 Damages: Duty to Mitigate
Instruction No. 45.560 Buyer's Damages: Breach of Contract to Sell Property
Instruction No. 45.570 Quantum Meruit
Instruction No. 45.600 Finding Instruction
Instruction No. 45.610 Finding Instruction: Third-Party Case

**Chapter 46 EMINENT DOMAIN**

Instruction No. 46.000 Scope of Jurors' Duties
Instruction No. 46.010 Just Compensation: No Damage to Residue
Instruction No. 46.020 Just Compensation: Damage to Residue and No Enhancement
Instruction No. 46.030 Just Compensation: Damage to Residue and Enhancement
Instruction No. 46.040 Just Compensation: Date of Determination
Instruction No. 46.050 Fair Market Value
Instruction No. 46.060 Fair Market Value: Use of Property
Instruction No. 46.070 Damage to Residue
Instruction No. 46.080 Lost Access
Instruction No. 46.085 Lost Profits
Instruction No. 46.090 Effect of Enhancement on Damage to Residue
Instruction No. 46.100 Damage to Residue: Formula for Determining
Instruction No. 46.110 Weight of Evidence—Value
Instruction No. 46.120 Landowner's Duty to Mitigate Damages
Instruction No. 46.130 "Quotient" Award Not Permitted
Instruction No. 46.140 Majority Award Permitted
Instruction No. 46.150 Highway Condemnation: Definition of Limited Access Highway
Instruction No. 46.160 [RESERVED]
Instruction No. 46.170 [RESERVED]
Instruction No. 46.180 Elements of Report

**Chapter 47 INSURANCE**

Instruction No. 47.000 Definition of Appointed Agent or Appointed Insurance Agent
Instruction No. 47.020 Agent for Insurer
Instruction No. 47.030 Agent's Acts Bind Insurer
Instruction No. 47.040 Agent's Apparent Authority
Instruction No. 47.050 Limits on Agent's Authority Unknown to Insured
Instruction No. 47.060 Ratification of Agent's Unauthorized Acts

Instruction No. 47.070 Agent's Knowledge Binds Insurer
Instruction No. 47.080 Existence of Policy: Burden of Proof
Instruction No. 47.090 Essential Elements of Insurance Contract
Instruction No. 47.100 Oral Contracts and Binders
Instruction No. 47.110 Inception of Insurance Contract
Instruction No. 47.120 Cancellation by Insurer: Burden of Proof
Instruction No. 47.125 Renewal Policy: Acceptance
Instruction No. 47.130 Recovery Under the Policy: Burden of Proof
Instruction No. 47.140 Defense to Liability: Loss Not Covered
Instruction No. 47.150 Waiver of Provisions Benefitting the Insurer
Instruction No. 47.160 Estoppel to Assert Forfeiture
Instruction No. 47.170 Issuing Policy With Knowledge of Breach
Instruction No. 47.180 Proof of Loss or Waiver
Instruction No. 47.190 Effect of Proof of Loss on Recovery at Trial
Instruction No. 47.200 Notice to Insurer: Reasonable Time
Instruction No. 47.210 Untrue Statements in Application
Instruction No. 47.220 Answers Recorded by Agent
Instruction No. 47.500 Definition of Accidental
Instruction No. 47.510 Accident: Insured the Aggressor
Instruction No. 47.515 Intentional Act
Instruction No. 47.520 Permanent Total Disability
Instruction No. 47.530 Policy Coverage: Burden of Proof
Instruction No. 47.540 Policy Exclusions: Burden of Proof
Instruction No. 47.550 Pre-Existing Condition
Instruction No. 47.600 [RESERVED]
Instruction No. 47.610 [RESERVED]
Instruction No. 47.700 Permissive Use Omnibus Clause
Instruction No. 47.710 Duty to Settle
Instruction No. 47.800 [RESERVED]
Instruction No. 47.810 Suicide: Burden of Proof
Instruction No. 47.820 Accidental Death: Pre-Existing Condition

**Chapter 48 WILL CONTESTS**

Instruction No. 48.000 Issues and Burden of Proof
Instruction No. 48.010 Definition of Will
Instruction No. 48.020 Proper Execution
Instruction No. 48.030 Testamentary Intent
Instruction No. 48.040 Testamentary Capacity
Instruction No. 48.050 Revocation
Instruction No. 48.055 Revocation Presumption
Instruction No. 48.060 Revival

Instruction No. 48.070 Undue Influence
Instruction No. 48.090 Finding Instruction

**Chapter 49 CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS**

Instruction No. 49.000 "Sexually Violent Predator"—Finding Instruction
Instruction No. 49.100 Standard of Proof—Clear and Convincing Evidence
Instruction No. 49.200 Definition of "Sexually Violent Offense"
Instruction No. 49.300 Definition of "Mental Abnormality" or "Personality Disorder"
Instruction No. 49.400 Expert Opinion; Jury's Determination as to Sexually Violent Predator

**TABLES**

Table of Cases
Table of Statutes

**INDEX**

# Chapter 1

# HOW TO USE THIS BOOK

(1) Model Instructions—Edition Preparation and Updating

(2) Model Instructions—Format and Use

(3) Summary of Contents—Civil Volume

(4) Jury Instructions—General Role and Limitations

(5) Special Considerations Applicable to Jury Instructions in Civil Cases

(6) Sample Instruction

Instruction No. 10.090 (Sample Form) Speed: Posted Minimum Speed

(7) Hypothetical Case

## (1) Model Instructions—Edition Preparation and Updating

To receive the maximum benefit from this book, please read this chapter before you use the instructions that follow. This chapter discusses the preparation and updating of the book, the format and intended uses of the model instructions and the research associated with them, as well as significant principles of Virginia law concerning the use of jury instructions in general.

The title page for this publication indicates the edition and the cumulative scope of statutory and case law coverage in it. The digital and printed editions are revised annually and are identical.

Each year, members of the Model Jury Instructions Committee review case law and legislative developments in detail and discuss proposed revisions to the book at face-to-face at meetings. Every effort is made to ensure that each instruction topic is thoroughly reviewed and reflects the legislative changes to and judicial interpretations and applications of Virginia law occurring since publication of the prior edition. Cases and legislation are also analyzed to determine whether changes should be made to the instructions themselves, or to their associated Sources and Authority statements (or both), and whether additional instructions should be provided. Proposed changes and additions are discussed and approved or rejected during annual Committee meetings devoted to the comprehensive review of the publication contents: one focused on the model criminal instructions, typically occurring in May, and the other focused on the model civil instructions, typically occurring in October.

Each annual replacement volume of the Virginia Model Jury Instructions includes a revised table of cases, index to code sections, and subject matter index. If instructions are added or former instructions are deleted, a revised table of contents is provided.

### (2) Model Instructions—Format and Use

As Virginia's appellate courts have observed, "[t]he purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict." *Delacruz v. Commonwealth, 11 Va. App. 335, 339, 398 S.E.2d 103, 105 (1990)*; *Cooper v. Commonwealth, 2 Va. App. 497, 500, 345 S.E.2d 775, 777 (1986)*. The goal, therefore, is to make instructions easy for the jury to understand. There are three characteristics of good jury instructions:

- Organization;
- Neutrality; and
- Simplicity.

Organization is crucial if the jurors are to understand the instructions. The instructions must be organized and presented in a logical sequence to help compensate for the jurors' lack of familiarity with legal concepts. Consistent with these principles, the Committee has made every effort to employ plain language in the model instructions, and to minimize the use of "legalese."

The model instructions presented in this volume are designed to be straightforward, unbiased, and simple: the instructions state what the law is, and not what it is not.

Some instructions can be given just as they appear in the book. However, many will require some changes to make them fit the facts of a particular case. No book of instructions can possibly anticipate the rich variety of facts that arise in litigation. The instructions provided in this volume are models or patterns from which to construct instructions that are apt for a case. Therefore, an instruction can be modified—or even created—to fit the particular facts and circumstances.

**Constraints and limitations on the use of model jury instructions.**

It is also important to bear in mind that, when modifying a model instruction, or when crafting a custom instruction "from scratch," the General Assembly has specifically provided that, in both civil and criminal cases, a proposed instruction that accurately states the applicable law "shall not be withheld from the jury solely for its nonconformance with the model jury instructions." Va. Code Ann. § 8.01-379.2 (civil cases); Va. Code Ann. § 19.2-263.2 (criminal cases). See also *Howsare v. Commonwealth, 293 Va. 439, 444, 799 S.E.2d 512, 515 (2017)*; *Harman v. Honeywell Int'l, Inc., 288 Va. 84, 104, 758 S.E.2d 515, 527 (2014)*; *Jeffress v. Virginia Ry. & Power Co., 127 Va. 694, 714, 104 S.E. 393, 399 (1920)* ("[I]t is well settled that each party has the right to have presented to the jury its contention upon vital points in language to be chosen by it, provided such language is in keeping with the law."); *Banner v. Commonwealth, 204 Va. 640, 645–46, 133 S.E.2d 305, 309 (1963)* ("It cannot be questioned that both the Commonwealth and the defendant are entitled to appropriate instructions telling the jury the law applicable to each version of the case, provided such instructions are based upon the evidence adduced[, a]nd each party may employ language of its own choosing so long as it is in keeping with the law."). It has also been expressly recognized that, while it is permissible to draft instructions using statutory language, other language may be used if it does not change the meaning of the law. *Fitzgerald v. Commonwealth,*

*223 Va. 615, 632, 292 S.E.2d 798, 808 (1982).* Accordingly, based on the foregoing, an instruction is not invalid simply because it does not appear within this book.

**Cautionary note on the indiscriminate use of language from appellate opinions when modifying model jury instructions.**

When modifying a model instruction, or when crafting a custom instruction "from scratch," bear in mind that Virginia's appellate courts have often cautioned against using the language appearing in a specific appellate opinion for a jury instruction, given that appellate opinions are meant to provide a rationale for a decision, and therefore "may not translate immutably into jury instructions." *Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 251, 520 S.E.2d 164, 173 (1999).* For instance, language appearing in opinions may include argumentative statements about legal matters that is inappropriate for consideration by the jury. *Cain, 290 Va. at 135, 772 S.E.2d at 897*; *Abernathy v. Emporia Mfg. Co., 122 Va. 406, 413, 95 S.E. 418, 420 (1918).* Accordingly, the indiscriminate use of language from appellate opinions in a jury instruction is discouraged because statements appearing in such opinions, while authority for the propositions set forth, are not necessarily proper language for jury instructions. *Seaton v. Commonwealth, 42 Va. App. 739, 753–54, 595 S.E.2d 9, 15–16 (2004)*; see also *Cain v. Lee, 290 Va. 129, 135, 772 S.E.2d 894, 897 (2015)*; *Blondel v. Hays, 241 Va. 467, 474, 403 S.E.2d 340, 344 (1991)*; *Oak Knolls Realty Corp. v. Thomas, 212 Va. 396, 397, 184 S.E.2d 809, 810 (1971).* Nevertheless, while "it may not be always advisable to copy the language of the courts as applied to the peculiar facts of one case then under consideration, and to embody such language in an instruction in another and a different case, it may properly be done if the same legal principle involved is applicable." *Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 346, 133 S.E. 776, 778 (1926).*

**Additional considerations concerning the format of the instructions.**

- **Pronouns.** The general style employed for the model instructions has been to draft the instructions as if the parties were individual males. Consideration therefore should be given to substituting such other pronouns as may be appropriate to the case. If a corporation, partnership, or other business entity is a party, you should use the name of the organization and change the pronouns for consistency. You may also want to alter the instruction to specify the appropriate party by name or party designation, when doing so will help make the instructions easier for the jury to understand.
- **Redundant language** should be removed when combining portions of instructions. This book includes elements in some instructions more than once because on occasion only a portion of the instruction will be used. For example, in finding and issues instructions, the final instruction should not repeat which party has the burden of proof multiple times, even though that is part of each element in the instructions.

Some model instructions also feature brackets and parentheses:

- **Brackets** contain either additional language that does not always apply when an instruction is given, or alternative language to be used. Bracketed language

should only be added to an instruction if it is supported by the facts. Some instructions feature multiple options for additional or alternative language within a single set of brackets, divided by a semicolon. You will have to read through the instruction to see exactly where to make an addition or substitution by using the bracketed language options, and modify the instruction so that only the pertinent option or options are presented to the jury when the instruction is given. The brackets should be omitted from the written version of the instruction that is provided to the jury.

- **Language in parentheses** indicates that additional information, such as a certain name, a specific description of some item, or other context-specific language is required to complete the instruction. When agency questions arise, for example, the only way to make the instruction intelligible is to name the principal, the agent, and the third party. Similarly, in defamation cases, the offending words may need to be either precisely set out or referred to specifically, such as by the date of a letter or other writing that contains them. Places in an instruction where this information should be supplied will be indicated using parenthetical expressions, which serve as placeholders. Similarly, the parentheses should be omitted from the written version of the instruction that is provided to the jury.

Each chapter of instructions is organized as follows:

### (a) Table of Contents

The first page in each chapter is a Table of Contents for that chapter. It will give you an outline of the overall coverage of the chapter and will help you locate the particular instruction you want quickly.

### (b) Scope Note

The Scope Note for each chapter indicates depth and breadth of coverage the Committee has given to the topic addressed in that chapter. In addition, it may alert you to any significant statutes or legal principles that apply to the topic in a general sense.

The Scope Note may also identify specific topics or items related to the subject matter of the chapter for which model instructions are not offered and may refer to cases and statutes that could be consulted in order to prepare appropriate instructions for those items.

In addition, the Scope Note discusses how each instruction relates to the others in the chapter, and to instructions appearing in other chapters, where applicable.

### (c) Instructions

Each instruction has a number and a title for identification purposes and contains the language that the Committee recommends. Instructions that are ultimately given to the jury must accurately state the law as it applies to the case; however, instructions that are nothing more than abstract statements of law are improper, even if they are accurate. *Rosen v. Greifenberger, 257 Va. 373, 380, 513 S.E.2d 861, 864–65 (1999)* ("[A] trial court should not give a jury instruction that, while a correct statement of the law as an abstract proposition, is inapplicable to the facts of the case.").

### (d) Sources & Authority statements

The Sources & Authority statement accompanying each model instruction is a concise overview of the legal sources and authorities upon which the instruction is based. It contains most of the leading references that you might wish to consult to learn more about the law on which the instruction is based, and is intended to serve as an ideal starting point for your research. The Sources and Authority statement is only a starting point, however. No attempt has been made to make the case citations exhaustive. The fact that a case is cited in the discussion does not necessarily mean that it directly supports the instruction; it may only relate to the instruction or indicate that an instruction is appropriate in certain circumstances. To be assured of the applicability of an instruction to the specific facts of your case, additional research may be required.

The Sources & Authority statement may be divided into separate sections: Governing Statutes, Case Authority (or, Principal Case Authority and Other Relevant Decisions), Practice Commentary, Practice Pointers, Alerts, and Research References. When there is no relevant material for a section, the word "None" is used. Each of these sections is analyzed and explained in detail below.

**GOVERNING STATUTES:** This section lists the statute or statutes from which the instruction was drawn and any other statutes that might be relevant.

**CASE AUTHORITY:** This section cites the leading cases that support or relate to the principles that are contained in the instruction. A review of these cases provides a brief sketch concerning the judicial evolution of the law on which the instruction is based. Cases are listed in reverse chronological order (most recent to oldest), with opinions of the Supreme Court of Virginia listed before opinions of the Court of Appeals of Virginia only when opinions from both courts are released in the same year.

Where numerous decisions have been examined, cases may be divided into PRINCIPAL CASE AUTHORITY and OTHER RELEVANT DECISIONS categories for ease of use.

"Principal Case Authority" permits you to quickly identify the leading cases to cite, either for explicit appellate court approval of an instruction, or for approval of or agreement with specific language used to describe a legal point or issue addressed in an instruction, or with regard to a legal doctrine or rule embraced by an instruction.

"Other Relevant Decisions" are pertinent in that they discuss the elements of the claim or defense addressed in an instruction, apply the legal doctrine or rule embraced by an instruction, or otherwise indicate support for such legal doctrine or rule.

**PRACTICE COMMENTARY** This section identifies concepts or principles related to use of the instructions thought to be important. Often, the Practice Commentary contains discussion of the case law, highlights the legal principles found in the instruction, and summarizes the main legal issues involved. The Practice Commentary may quote crucial language from a leading opinion, and will include citations for cases in which that specific model instruction, or the language appearing in it, has either been expressly approved or disapproved by Virginia's appellate courts. In

addition, this section may contain cross-references to other instructions.

☞ ***PRACTICE POINTER:*** Prompted by issues addressed in the instructions and by the topical research on which they are based, these entries suggest or note particular strategic or planning concerns that may be useful in preparing for or conducting the trial.

***ALERTS:*** This section warns the user of any significant problems or pitfalls involving the language of the instruction or the substantive law on which it is founded. It often points out unresolved ambiguities that exist in the cases or stresses the limitations of a particular instruction. It also discusses problems that may arise when the instruction is used.

***RESEARCH REFERENCES:***

This section lists additional relevant authorities and sources of information that can be consulted for additional research. Citations to the most current editions of leading Virginia legal encyclopedias and treatises on Virginia law are provided. Please note that these references do not specify the particular year or edition of the works being cited, as these sources are digital and are continuously updated by their respective publishers. Users should simply consult the most recent edition of these sources that is available to them, whether printed or digital, relying on the chapter(s) or section number(s) provided in the citation.

### (3) Summary of Contents—Civil Volume

This volume provides a comprehensive set of general and specific model instructions relating to the subject matter most frequently addressed in civil litigation in Virginia, including defenses that are asserted in that context. These instructions are designed to serve as guides and templates for drafting instructions that are simple, impartial, clear, and concise, so that in every civil case the jury may be fully, fairly, and properly instructed.

General instructions applicable to most cases are found in Chapter 2. Chapter 3 contains issues, burden of proof, and finding instructions that are adaptable to the subject matter of any civil lawsuit. Chapters 4 through 48 include instructions on substantive civil causes of action and applicable defenses, covering the following topic areas: agency, employment, and similar relationships; animals; assault and battery; bailments; breach of contract; causation; civil conspiracy; compromise and settlement; damages; dangerous instrumentalities; defamation; eminent domain; emotional distress (negligent and intentional); false advertising; false imprisonment; fraud; insurance disputes; interference with contractual relationships (current and prospective); landlord and tenant; malicious prosecution; motor vehicles; liability of municipal corporations and sovereign immunity; negligence; nuisance; products liability; professional liability of various kinds, including attorneys, brokers, medical malpractice, and other similar claims; property owners and occupants, including premises liability; railroads and other common carriers; trespass; and will contests. Chapter 49 has instructions applicable in proceedings concerning the civil commitment of sexually violent predators.

A list of cited cases, cited statutes, and a subject matter index conclude the volume following chapter 49.

PLEASE NOTE THAT THE INSTRUCTION DESIGNATIONS, AS WELL AS THE INSTRUCTION TITLES, SHOULD NOT BE SHOWN ON THE INSTRUCTIONS PRESENTED TO THE JURY.

**(4) Jury Instructions—General Role and Limitations**

***Purpose.*** The purpose of jury instructions is to enable the jury to reach the correct conclusion. See *Delacruz v. Commonwealth, 11 Va. App. 335, 339, 398 S.E.2d 103, 105 (1990)*; *Cooper v. Commonwealth, 2 Va. App. 497, 500, 345 S.E.2d 775, 777 (1986)*. To that end, "instructions should be simple, impartial, clear, and concise." *Bryant v. Commonwealth, 216 Va. 390, 392, 219 S.E.2d 669, 671 (1975)*. Instructions must not confuse the jury, and should aid the jurors in their deliberations, rather than make the deliberations more difficult. *Castle v. Lester, 272 Va. 591, 605, 636 S.E.2d 342, 349 (2006)*; *Honsinger v. Egan, 266 Va. 269, 274, 585 S.E.2d 597, 600 (2003)*; *Gaalaas by Gaalass v. Morrison, 233 Va. 148, 156, 353 S.E.2d 898, 902 (1987)*; *Southers v. Price, 211 Va. 469, 473, 178 S.E.2d 685, 688 (1971)*; *H. W. Miller Trucking Co. v. Flood, 203 Va. 934, 936, 128 S.E.2d 437, 439 (1962)*.

***Counsel's role.*** Generally, it is the duty of counsel to aid the court in the function of instructing the jury. *E.I. Du Pont de Nemours & Co. v. Snead's Adm'r, 124 Va. 177, 187–88, 97 S.E. 812, 815 (1919)* (observing that "[t]he trial court . . . cannot be required to instruct the jury generally in the case" and that it is not "the practice in [Virginia] for the trial court to give instructions unless requested," subject to an exception applicable in criminal cases, which is discussed below). The very purpose of permitting requests for instructions is so that each of the litigants have an opportunity to fully inform the jury as to the law and their respective theories of the case. See, e.g., *Womack v. Circle, 70 Va. (29 Gratt.) 192, 208 (1877)* ("It has not been the practice in Virginia, as in England, for the courts to charge the jury upon the law of the case, and it is not error to refuse to give such charge, or to refuse to instruct generally upon the law of the case. If either party desire any specific instruction to be given, he has the right to ask it, and the court is bound to give it, provided it expounds the law correctly upon any evidence before the jury."). In addition, it is "axiomatic that a party is entitled to have jury instructions that address his or her theory of the case so long as that theory is supported both by law and fact." *Honsinger, 266 Va. at 274, 585 S.E.2d at 600*. Accordingly, the court should instruct the jury on the law that is supported by the evidence to the extent necessary to allow each side to have a basis for arguing its theory to the jury. *Price v. Taylor, 251 Va. 82, 85, 466 S.E.2d 87, 88 (1996)*; *Bowers v. May, 233 Va. 411, 413–14, 357 S.E.2d 29, 30 (1987)*. See also *Banner v. Commonwealth, 204 Va. 640, 645–46, 133 S.E.2d 305, 309 (1963)*.

However, not all arguments that counsel, or the parties, intend to make deserve a jury instruction.

***Evidence Supporting Instruction.*** First and foremost, only those arguments and theories that are supported by appreciable evidence in the record entitle a litigant to request that an instruction be given embodying such arguments and theories. *Realty Co. of Va. v. Burcum, 129 Va. 466, 470, 106 S.E. 375, 376 (1921)* (observing that "merely because a plaintiff, or, for that matter, a defendant, has a theory of the case, he is [not] thereby entitled to an instruction upon that theory," because "[a] *sine qua non* of his

right to an instruction is that it is supported by some appreciable evidence"); see also *Harris v. Commonwealth, 134 Va. 688, 695, 114 S.E. 597, 600 (1922)* (same). "Plainly an instruction cannot be given because it is in line with a litigant's theory[,] unless that theory finds support in the evidence." *Campbell Soup Co. v. Davis, 163 Va. 89, 95, 175 S.E. 743, 746 (1934)*; *Williams Paving Co. v. Kreidl, 200 Va. 196, 202, 104 S.E.2d 758, 762 (1958)*. Accordingly, a court does not err in refusing to grant instructions requested by a party that are in line with its theory of the case where there is no evidence in the record supporting that theory. *Campbell Soup Co., 163 Va. at 95, 175 S.E. at 746*; *Penoso v. D. Pender Grocery Co., 177 Va. 245, 249, 13 S.E.2d 310, 312 (1941)*; *Williams Paving Co.*, 200 Va. at 201–02, 104 S.E.2d at 761–62. See also *Waters v. Commonwealth, 39 Va. App. 72, 79–80, 569 S.E.2d 763, 766–67 (2002)* (finding no error in trial court's refusal to give requested instruction on defense of accident, where no evidence supported that defense); *Helmick v. Commonwealth, 38 Va. App. 558, 568–69, 567 S.E.2d 551, 556–57 (2002)* (same). Indeed, instructions that are nothing more than abstract statements of law are improper, even if they are technically accurate, where they are inapplicable to the facts of the case. *Juniper v. Commonwealth, 271 Va. 362, 431, 626 S.E.2d 383, 426 (2006)* (observing that "even if jury instructions contain accurate statements of law, a trial court does not abuse its discretion by refusing [an] instruction if it is not applicable to the facts and circumstances of the case, or if it would have created confusion and would have been misleading" if given); *Rosen v. Greifenberger, 257 Va. 373, 380, 513 S.E.2d 861, 864–65 (1999)*; *Hubbard v. Commonwealth, 243 Va. 1, 15, 413 S.E.2d 875, 883 (1992)*; *Hatcher v. Commonwealth, 218 Va. 811, 813–14, 241 S.E.2d 756, 758 (1978)*. See also *Bolyard v. Commonwealth, 11 Va. App. 274, 277, 397 S.E.2d 894, 896 (1990)*; *Stewart v. Commonwealth, 10 Va. App. 563, 570, 394 S.E.2d 509, 513 (1990)*. Likewise, it is well established that in both civil and criminal litigation, more than a scintilla of evidence is necessary to support an instruction. *Turman v. Commonwealth, 276 Va. 558, 564, 667 S.E.2d 767, 770 (2008)*; *Porter v. Commonwealth, 276 Va. 203, 242, 661 S.E.2d 415, 434 (2008)*; *Schlimmer v. Poverty Hunt Club, 268 Va. 74, 78, 597 S.E.2d 43, 45 (2004)*.

***Multiple Instructions on One Issue Avoided.*** Secondly, multiple instructions covering the same legal principles are undesirable, when one instruction correctly states the law. *Tuggle v. Commonwealth, 228 Va. 493, 508, 323 S.E.2d 539, 548 (1984)*; *Wilson v. Commonwealth, 25 Va. App. 263, 275, 487 S.E.2d 857, 863 (1997)*. This is so because multiple instructions on the same principle can result in juror confusion and thereby unnecessarily increase the difficulty of deliberations. *Honsinger, 266 Va. at 274, 585 S.E.2d at 600*; *Morse v. Commonwealth, 17 Va. App. 627, 633, 440 S.E.2d 145, 149 (1994)*; *King v. Commonwealth, 2 Va. App. 708, 711, 347 S.E.2d 530, 531 (1986)*. Accordingly, refusal to permit the jury to receive other instructions on a legal principle fully and fairly covered by the instructions already granted is not an abuse of discretion. *Poliquin v. Daniels, 254 Va. 51, 59, 486 S.E.2d 530, 535 (1997)*; *Eaton v. Commonwealth, 240 Va. 236, 255, 397 S.E.2d 385, 397 (1990)*; *Stockton v. Commonwealth, 227 Va. 124, 145, 314 S.E.2d 371, 384 (1984)*; *Cox v. Mabe, 214 Va. 705, 709, 204 S.E.2d 253, 257 (1974)*. Furthermore, while Va. Code Ann. § 8.01-379.2 provides that an instruction may not be withheld from the jury in a civil case solely because it varies

from a model instruction on the same or a related topic, "it is not error for a court to reject proposed additions to a model instruction that are redundant." *Harman, 288 Va. at 104, 758 S.E.2d at 527*; *Wilson v. Brown, 136 Va. 634, 637–38, 118 S.E. 88, 89 (1923)*. In this same vein, an instruction is improper if it singles out one portion of the evidence, and unduly emphasizes it over other facts equally pertinent to the jury's resolution of an issue. *Hilton v. Commonwealth, 293 Va. 293, 302, 797 S.E.2d 781, 786 (2017)*; *Snyder v. Commonwealth, 220 Va. 792, 797, 263 S.E.2d 55, 58 (1980)*; *Norfolk Hosiery & Underwear Mills v. Aetna Hosiery Co., 124 Va. 221, 236, 98 S.E. 43, 47 (1919)*; *New York, Philadelphia & Norfolk R.R. Co. v. Thomas, 92 Va. 606, 609, 24 S.E. 264, 265 (1896)*. As a result, where there are two conflicting theories of a case, the evidence is similarly in conflict, and each theory has been covered by a separate instruction, no other instruction should be given covering only one of such theories, as it would give undue emphasis to that theory. Nevertheless, under appropriate circumstances, it is not error to give another instruction covering both theories. *Washington & Old Dominion R.R. Co. v. Ward, 119 Va. 334, 342–43, 89 S.E. 140, 143 (1916)*. In addition, "[o]nce a jury is instructed regarding the use or limitations placed upon specific evidence, they are presumed to follow such instructions." *Lawson v. Commonwealth, 13 Va. App. 109, 112, 409 S.E.2d 466, 467 (1991)*; *Lewis v. Commonwealth, 8 Va. App. 574, 580, 383 S.E.2d 736, 740 (1989)*; *Lewis v. Commonwealth, 211 Va. 80, 84, 175 S.E.2d 236, 239 (1970)*.

***Misleading Instructions.*** Thirdly, if an instruction may reasonably be regarded as having a tendency to mislead the jury, it is error to give it. *Castle, 272 Va. at 605, 636 S.E.2d at 349*; *H. W. Miller Trucking Co. v. Flood*, 203 Va. 934, 937, 128 S.E.2d 437, 440 (1962). The same is true of instructions that are "confusing and subject to misunderstanding." *Gaalaas, 233 Va. at 157, 353 S.E.2d at 903*. Accordingly, if multiple instructions are given dealing with the same topic, the instructions "should be qualified by a cross-reference to [one] another in a manner which will clearly convey to the jury the force and effect of the qualification." *Johnson v. Commonwealth, 220 Va. 146, 155, 255 S.E.2d 525, 530 (1979)*; *Outlaw v. Pearce, 176 Va. 458, 469–70, 11 S.E.2d 600, 605 (1940)*. Failure to make all of the instructions, taken as a whole, a correct and clear statement of the law constitutes reversible error that is not harmless, even though individual instructions may have "unitary accuracy." *Johnson, 220 Va. at 155, 255 S.E.2d at 530*. See also *Darnell v. Commonwealth, 6 Va. App. 485, 492, 370 S.E.2d 717, 721 (1988)* (observing that "[i]n determining whether jury instructions are proper, we must read and consider them all together"); *Bowman v. Commonwealth, 174 Va. 461, 465, 5 S.E.2d 497, 499 (1939)* (same). Instructions that conflict, or that are inconsistent with each other, are to be avoided. *Norfolk Ry. & Light Co. v. Higgins, 108 Va. 324, 332, 61 S.E. 766, 768 (1908)* (stating that "where there are conflicting or inconsistent instructions given in a case, the verdict of the jury has to be set aside and a new trial awarded, as the court cannot say whether the jury were guided by the correct or incorrect instructions" and explaining that "this rule is too well established to require a citation of the authorities supporting it"); *Southern Ry. Co. v. Hansbrough's Admx., 107 Va. 733, 748, 60 S.E. 58, 64 (1908)* (instructions conflicting on a material point

require a new trial); *Richmond Passenger & Power Co. v. Steger, 101 Va. 319, 321, 43 S.E. 612, 613 (1903).*

***Oral Supplemental Instructions; Instructions Inviting Speculation.*** Oral instructions are permissible when requested or to clarify a general statement in the written instructions. *Drinkard v. Commonwealth, 165 Va. 799, 804, 183 S.E. 251, 253 (1935).* A judicial response to a jury question is considered a legal instruction. *Ludwig v. Commonwealth, 52 Va. App. 1, 11, 660 S.E.2d 679, 683–84 (2008).* However, it is improper to give oral instructions to the jury that allow it to speculate on what will happen after the trial. *Booker v. Commonwealth, 276 Va. 37, 42–43, 661 S.E.2d 461, 464 (2008)* (improper to give oral instruction on matters such as the authority of the trial court to reduce the active sentence). Indeed, an instruction permitting the jury to engage in conjecture and speculation is improper, regardless of its form. See, e.g., *Collins v. Smith, 198 Va. 778, 785, 96 S.E.2d 818, 824 (1957)* (jury should not have been permitted to speculate upon what "other warning and protective devices" or "other safety precautions" should have been employed in a negligence case); *Southern Ry. Co., 107 Va. at 748, 60 S.E. at 64.*

***Noting Inaccuracies.*** Where the instructions of the court do not cover all phases of the case or are inaccurate statements of the law, or are otherwise insufficient, counsel must call attention to the omission, inaccuracy, or insufficiency by appropriate objection. Except for good cause shown or to enable the appellate court to attain the ends of justice, counsel's failure to object precludes using the omission or inaccuracy as the basis for reversible error. See Va. Sup. Ct. R. 5:25, 5A:18. See also *Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992)* (two instructions read to the jury and imposing an inappropriate standard, absent any objection, become the law of the case and thereby bind the parties in the trial court and the appellate court on review); *Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd., 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989)* (same); *Oden v. Salch, 237 Va. 525, 533, 379 S.E.2d 346, 351 (1989)*; *Commonwealth v. Millsaps, 232 Va. 502, 509, 352 S.E.2d 311, 315 (1987)*; *Medical Ctr. Hosps. v. Sharpless, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985)*; *Norfolk & Portsmouth R.R. v. Barker, 221 Va. 924, 929, 275 S.E.2d 613, 616 (1981)*; *Preston v. Land, 220 Va. 118, 120, 255 S.E.2d 509, 510 (1979)*; *Bostic v. Whited, 198 Va. 237, 239, 93 S.E.2d 334, 335 (1956).*

***Timing of Instructions.*** In all cases, the court instructs the jury before closing arguments. This practice is a matter of Virginia custom in civil cases but is an express requirement in criminal cases. See Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 13.9, at 1143 (6th ed. 2014); Va. Sup. Ct. R. 3A:16(a). The trial judge considers the instructions as submitted by counsel for the parties, and ascertains whether any instructions require minor editing, substantive amendment, or rejection. In reviewing the proffered jury instructions, it is ultimately the responsibility of the trial judge to see that the applicable law has been clearly stated and that the instructions cover all issues which the evidence fairly raises. *Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009)*; *Landeck v. Commonwealth, 59 Va. App. 744, 758–59, 722 S.E.2d 643, 650 (2012).* Each finalized and approved instruction is then given separately, rather than in an overall charge as is commonly done in the federal

system. See Sinclair & Middleditch, Virginia Civil Procedure § 13.9, at 1143. By custom as well, the judge reads these instructions to the jury and then allows written versions of those instructions to be taken to the jury room. *New York, Philadelphia & Norfolk R.R. Co.*, 92 Va. at 609, 24 S.E. at 265.

***RESEARCH REFERENCES*:**

For a discussion of early Virginia cases addressing jury instruction issues applicable in civil and criminal cases, see the memorandum attached to *Womack v. Circle, 70 Va. (29 Gratt.) 192, 211 (1877).*

For a comprehensive review of Virginia legal principles applicable to jury instructions, including modern opinions, see MICHIE'S JURISPRUDENCE, Instructions §§ 1–51.

### (5) Special Considerations Applicable to Jury Instructions in Civil Cases

In a civil trial, the burden is on the parties to furnish the trial court with proper and appropriate instructions that address their respective theories of the case, and when a proffered instruction is not a correct statement of the law or is not supported by the evidence in the case, the trial court is not required to correct or amend the instruction. Instead, the trial court may simply refuse to grant it. *Peele v. Bright, 119 Va. 182, 184, 89 S.E. 238, 239 (1916)*; *Chesapeake & Ohio Ry. Co. v. F. W. Stock & Sons, 104 Va. 97, 112, 51 S.E. 161, 166 (1905)* (observing that in these circumstances, a party "cannot complain that the court did not, of its own motion, modify and correct the request[ed instruction] and then give it as corrected" because "[n]o such duty rests upon the court").

The jury will understand instructions better if these suggestions are followed:

- Tell the jury what the issues in the case are and who must prove each issue.
- Describe each duty, elaborate on each issue, and define legal terms with an instruction that is phrased in simple, nontechnical language that is free of argument or partisanship.
- Use the minimum number of finding instructions; usually one is enough.

The structure of the model instructions set out in this book follows the timeworn pattern: tell them what you are going to tell them (specify what the issues are), then tell them (define terms and describe the duties), and finally tell them what you have told them (give the finding instruction). In addition to this overall organization, the model issues instructions and the model finding instructions have the same structure and are parallel in language. The repetition and parallel structure inherent in this format are intended to help the jury understand the instructions by making them clear. This approach not only removes the court from any role of advocacy, simplifies the language of the instructions, and reduces the total number of instructions, but also usually makes it possible to give only one finding instruction.

A "finding" instruction has been defined as one which "state[s] a case upon which the plaintiff should recover," *Sun Life Assurance Co. v. Bailey, 101 Va. 443, 449, 44 S.E. 692, 694 (1903)*. It "concludes with a direction to the jury to 'find for the plaintiff' or 'find for the defendant,' as the case may be." *Dunn v. Strong, 216 Va. 205, 208, 217 S.E.2d 831, 833 (1975)*. However, it need not contain the word "find"; it is sufficient

that the instruction directs the jury to arrive at a specific conclusion or admonishes the jury that a specific conclusion cannot be drawn unless certain prerequisites are sufficiently proven. *Dunn, 216 Va. at 208, 217 S.E.2d at 833*. Such an instruction "must state a complete case and embrace all elements necessary to support a verdict." *Thomas v. Snow, 162 Va. 654, 662, 174 S.E. 837, 840 (1934)*. It must also "be based upon the evidence in the case," and "must not be partial, nor omit all reference to material evidence in the case." *Dunn, 216 Va. at 208, 217 S.E.2d at 833*. See also *Stevens v. Mirakian, 177 Va. 123, 132, 12 S.E.2d 780, 784 (1941)* (an instruction qualifying as a finding instruction "clearly should have embraced all of the material theories of the case").

An "issues" instruction is one that addresses one or more issues that the jury is to consider. It may be phrased directly by stating, "The issues in this case are: . . .", followed by questions that call for the jury to supply "yes" or "no" answers. See, e.g., *Allison v. Brown, 293 Va. 617, 624, 801 S.E.2d 761, 771 (2017)* (observing that the "issues" instruction given in that case informed the jury that "[t]he issues in this case are: (1) Was the defendant negligent in that he did not have informed consent? [and] (2) If he was negligent, was his negligence a proximate cause of the plaintiff's injuries?"). For additional discussion of the role of issues instructions, see the Practice Commentary to Instruction No. 3.000, Negligence: Issues and Allocation of Burdens of Proof.

It is well-settled that "issues" instructions, and instructions other than "finding" instructions, may be given separately on the various points of law involved in a case. See Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 13.9, at 1144 (6th ed. 2014). Accordingly, instructions may, and often are, given to define the duty or duties which a defendant owes to a plaintiff. Such instructions, if given, "should be set forth with reasonable clearness," and if such an instruction "is so framed as to be calculated to confuse or mislead the jury . . . it is prejudicial error." *Thomas, 162 Va. at 662, 174 S.E. at 840*. Regarding these kinds of instructions, it has been held that "where the object of an instruction is merely to define the duty of the defendant arising out of a supposed state of facts, and it does not purport to contain a complete hypothesis on which a plaintiff suing for injuries caused by alleged negligence is entitled to recover, it is not necessary in such an instruction to refer to the duty or supposed negligence of the plaintiff." *Atlantic & Danville Ry. Co. v. Reiger, 95 Va. 418, 429, 28 S.E. 590, 594 (1897)*. In addition, it has been held that "[w]here an instruction is not a finding instruction, and some element is omitted which should have been included, it is not reversible error to give such instruction if another instruction given by the court includes such omitted element and supplements the incomplete instruction[,] and [it] is [also] not misleading, confusing or contradictory." *Colonial Pipeline Co. v. Lohman, 207 Va. 775, 783, 152 S.E.2d 34, 40–41 (1967)*.

Regarding "finding" instructions, a plaintiff's instructions are subject to different requirements than a defendant's instructions. A plaintiff's finding instructions must include all of the essential elements of the plaintiff's case. *Atlantic Co. v. Roberts, 179 Va. 669, 672, 20 S.E.2d 520, 522 (1942)* (where "[n]o reference [w]as made [in an instruction] to the necessity of proving [the] primary negligence of the defendants to warrant a recovery" by the plaintiff, such "omission of reference to the fundamental

gravamen of a negligence action constitutes reversible error"); *Stevens, 177 Va. at 132, 12 S.E.2d at 784* (same). On the other hand, a defendant's finding instructions need address only one element; oftentimes it is dispositive as to the defendant's liability, or the recovery of damages. See Sinclair & Middleditch, Virginia Civil Procedure § 13.9, at 1144.

***RESEARCH REFERENCES*:**

For a discussion of early Virginia cases addressing jury instruction issues applicable in civil and criminal cases, see the memorandum attached to *Womack v. Circle, 70 Va. (29 Gratt.) 192, 211 (1877).*

For a comprehensive review of Virginia legal principles applicable to jury instructions, including modern opinions, see MICHIE'S JURISPRUDENCE, Instructions §§ 1–51.

### (6) Sample Instruction

To help you understand the instructions in this book, and how they are intended to be used, a sample motor vehicle instruction is reproduced below. After the sample instruction is a discussion of each part of it.

**Instruction No. 10.090 (Sample Form) Speed: Posted Minimum Speed**

**The minimum speed required at the time and place of the collision was** (number) **miles per hour. The driver of a vehicle has a duty not to drive his vehicle at a speed below the posted minimum speed** [except when necessary for safe operation; except when in compliance with the law]**.**

**If a driver was driving his vehicle at less than the posted minimum speed, then he was negligent** [unless it was necessary for safe operation; unless it was in compliance with the law]**.**

This is a representative civil negligence instruction. The first paragraph states in positive terms what the duty is and indicates the applicable exceptions. The second paragraph states that failure to perform the duty is negligence, unless an exception applies. In many of the negligence instructions concerning the operation of motor vehicles, exceptions to the duty at issue are not applicable, and the last paragraph of the instruction simply states: "If a driver fails to perform this duty, then he is negligent."

Note that this is not a finding instruction. Few negligence cases consist of only one negligence issue. If every instruction was a finding instruction, the instructions would become cumbersome and difficult to understand. As the instructions provided in the hypothetical case set out at the end of this chapter show, only one finding instruction is needed in most cases.

Because the instructions set out in this book are only models, they do not specify whether the duty at issue is the defendant's, or the plaintiff's, or both. The instructions can readily be modified to specify the appropriate party by name or party designation.

The possibly confusing phrase "guilty of negligence," which appeared in this and some earlier versions of model instructions, has been replaced with "negligent." This substitution is based on the idea that in the context of civil litigation, negligence is a tort, not a crime.

This instruction also illustrates how brackets and parentheses are used. As mentioned previously, brackets in model instructions contain either additional language that does not always apply, or alternative language that can be used. This sample instruction uses brackets to propose language that can be added if it is supported by the facts. Here, there were two fairly common situations where driving below the posted limit is permitted: when doing so is necessary for safe operation of the vehicle, or when doing so is otherwise in compliance with the law. Note that both are included within a single set of brackets, divided by a semicolon. Alternative language that may be given is also enclosed within the same set of brackets and divided by semicolons. You will have to read through the entire instruction to see exactly where to make desired additions or substitutions.

Similarly, the language in parentheses indicates that additional information, such as a certain name or a specific description of some item (here, the number of miles per hour), is required to complete the instruction. Other situations requiring the input of specific additional information occur throughout the instructions. When agency questions arise, for example, the only way to make the instruction intelligible to the jury is to include the names of the principal, the agent and the third party involved in the case. Similarly, in defamation cases, the words claimed to be actionable must be spelled out or referred to specifically, such as by the date of the letter or other communication in which they were made.

### (7) Hypothetical Case

Since motor vehicle cases are the most common, a hypothetical automobile collision will serve as a model. The arrangement of the instructions is dictated by logic; the principles demonstrated here are adaptable to any case tried by jury.

#### i. Factual Background

Robert Heath was traveling north on Jackson Road approaching its intersection with Stanton Road. Isaac Murphy was driving east on Stanton toward its intersection with Jackson. Jackson Road is a through street; traffic on Stanton must stop at a stop sign.

Heath's car and Murphy's car collide at the intersection; each claims that the other was at fault. Heath maintains that he had the right-of-way and that Murphy failed to keep a proper lookout and ran the stop sign. Murphy claims that he stopped and looked carefully and, on seeing nothing, pulled out only to be struck by Heath's automobile as it traveled at such an excessive rate of speed on Jackson that Heath could not maintain control.

Heath sues Murphy; Murphy raises the defense of contributory negligence. The proof at trial from both sides was sufficient to create a jury issue on all the issues raised above. In addition, Heath proved substantial, temporary personal injuries and substantial property damage to his car.

In addition to Instruction No. 2.000, Preliminary Instructions to Jury, that should be given at the beginning of the trial, the following instructions are recommended to be given in the sequence shown. Each of these instructions appears in this book. Many of them have been adapted from the form in which they appear in the book so that they

fit the facts of this case. If you compare the instructions given here with the model in the body of the book, you can gauge the way in which these instructions can be adapted.

**ii. Suggested Sequence of Instructions for Hypothetical Case**

(1) 3.000 Negligence: Issues and Allocation of Burdens of Proof.

(2) 3.100 Standard of Proof: Definition of Greater Weight of the Evidence (some courts place this instruction either immediately before or immediately after the finding instruction (number (11) below), since that instruction generally contains the first reference the jurors will hear to the term "greater weight of the evidence.").

(3) 4.000 Definition of Negligence.

(4) 5.000 Definition of Proximate Cause.

(5) 6.000 Definition of Contributory Negligence.

(6) 6.040 Contributory Negligence: Burden of Proof.

(7) 10.000 Lookout; Control; Speed.

(8) 10.270 Stop Sign: Yielding Right-of-Way.

(9) 10.020 Lookout: Scope of Duty to Keep a Proper Lookout.

(10) 10.080 Speed: Exceeding Posted Limit.

(11) 3.050 Finding Instruction.

(12) 9.000 General Personal Injury and Property Damage.

(13) 9.060 Property Damage: Partial Loss.

(14) 9.010 Reasonable Proof.

(15) 2.020 Credibility of Witnesses (some courts place this at the beginning).

**iii. Suggested Text of Instructions for Hypothetical Case**

The 15 instructions appearing below are set out in the sequence suggested in the preceding list and have been modified to fit the facts of the case that were set out above in the Factual Background. The titles of the suggested instructions are given here for your benefit. As mentioned above, Instruction No. 2.000, Preliminary Instructions to Jury, or equivalent guidance, would also be appropriate to give beforehand. In a real case, it is also recommended that the titles of the instructions that are proposed by counsel (whether based on the model instructions in this book or created "from scratch") and that are approved by the court not be given to the jury.

**(1) Instruction No. 3.000, Negligence: Issues and Allocation of Burdens of Proof**

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was the defendant negligent?

(2) If the defendant was negligent, was his negligence a proximate cause of the accident?

On these issues the plaintiff has the burden of proof.

(3) Was the plaintiff negligent?

(4) If he was negligent, was the plaintiff's negligence a proximate cause of the accident?

On these issues the defendant has the burden of proof.

(5) If the plaintiff is entitled to recover, what is the amount of the plaintiff's damages?

On this issue the plaintiff has burden of proof.

Your decision on these issues must be governed by the instructions that follow.

**(2) Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence**

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.

**(3) Instruction No. 4.000, Definition of Negligence**

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

**(4) Instruction No. 5.000, Definition of Proximate Cause**

A proximate cause of an accident, injury, or damage is a cause that in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred.

**(5) Instruction No. 6.000, Definition of Contributory Negligence**

Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of this case.

**(6) Instruction No. 6.040, Contributory Negligence: Burden of Proof**

When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent, and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

**(7) Instruction No. 10.000, Lookout; Control; Speed**

The driver of a vehicle has a duty to use ordinary care:

(1) to keep a proper lookout;

(2) to keep his vehicle under proper control; and

(3) to operate his vehicle at a reasonable speed under the existing conditions.

If a driver fails to perform any one or more of these duties, then he is negligent.

**(8) Instruction No. 10.270, Stop Sign: Yielding Right-of-Way**

When the defendant approached the intersection of Jackson and Stanton Roads, he had a duty to stop at the point nearest Jackson Road where he would have a view of approaching traffic on that road. Before proceeding, the defendant also had a duty to yield the right-of-way to any approaching vehicle.

If the defendant failed to use ordinary care to perform either or both of these duties, then he is negligent.

**(9) Instruction No. 10.020, Lookout: Scope of Duty to Keep a Proper Lookout**

The duty to keep a proper lookout required the defendant to use ordinary care to look in all directions for vehicles that would affect his driving, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid a collision under the circumstances.

**(10) Instruction No.10.080, Speed: Exceeding Posted Limit**

The maximum speed limit on Jackson Road at the time this collision occurred was 45 miles per hour.

If the plaintiff was driving his vehicle faster than 45 miles per hour, then he was negligent.

**(11) Instruction No. 3.050, Finding Instruction**

You shall find your verdict for the plaintiff if the plaintiff has proved by the greater weight of the evidence that:

(1) the defendant was negligent; and that

(2) the defendant's negligence was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the defendant if:

(1) the plaintiff failed to prove either or both of the two elements above; or if

(2) you find by the greater weight of the evidence that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of the accident.

**(12) Instruction No. 9.000, General Personal Injury and Property Damage**

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:

(1) Any bodily injuries the plaintiff sustained and their effect on his health according to their degree and probable duration;

(2) Any physical pain he suffered;

(3) Any inconvenience the accident and his injuries caused him;

(4) Any medical expenses he incurred;

(5) Any earnings he lost because he was unable to work at his calling;

(6) Any property damage he sustained.

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.

**(13) Instruction No. 9.060, Property Damage: Partial Loss**

The measure of damages to the plaintiff's automobile is the reasonable cost of repairing it plus the amount, if any, the automobile depreciated because it was damaged, plus the necessary and reasonable expenses shown by the evidence to have been incurred by the plaintiff as a result of the damage to the automobile.

**(14) Instruction No. 9.010, Reasonable Proof**

The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

**(15) Instruction No. 2.020, Credibility of Witnesses**

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any has been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

# Chapter 2

# GENERAL INSTRUCTIONS



## Scope Note

**Instruction No. 2.000** Preliminary Instructions to Jury
**Instruction No. 2.020** Credibility of Witnesses
**Instruction No. 2.030** Adverse Witness
**Instruction No. 2.040** Expert Witness
**Instruction No. 2.060** Party Bound by His Own Testimony
**Instruction No. 2.080** Unexplained Failure to Produce Important Witness
**Instruction No. 2.090** Jury View
**Instruction No. 2.100** Circumstantial Evidence
**Instruction No. 2.130** Prior Inconsistent Statement by Witness
**Instruction No. 2.135** Prior Inconsistent Statement by Party
**Instruction No. 2.140** Prior Conviction of Felony or Crime Involving Moral Turpitude
**Instruction No. 2.170** Rejected and Stricken Evidence
**Instruction No. 2.180** Amount Sued for Is Not Evidence
**Instruction No. 2.190** Peremptory Instruction
**Instruction No. 2.200** Effect of Defendant Admitting Liability
**Instruction No. 2.210** Effect of Judge Striking Defense
**Instruction No. 2.220** Verdict Not to Be Based on Sympathy, Bias, Guesswork, or Speculation
**Instruction No. 2.240** Verdict Against an Estate: Dead Man's Act
**Instruction No. 2.250** Unanimous Verdict: "*Allen* [*"Titcomb"*] Charge"

# SCOPE NOTE

This chapter covers a wide range of instructions that are given before, during, and after a trial.

Instruction No. 2.000, which is designed to be used before trial to help acquaint the jurors with the way in which a civil case is tried, is taken from the appendix to the Virginia Circuit Court Judges Benchbook—Civil (Lexis Law Publishing, updated annually). (For guidance through the trial proceeding generally, see the Virginia Circuit Court Judges Benchbook—Civil.)

No instruction advises the jurors to consider the instructions as a whole. While such an instruction may be good general advice, it is not necessarily sufficient to cure errors of inconsistency or incompleteness in the other instructions. If an instruction is accurate or complete only when read with another, a specific cross reference to that instruction is needed.

Instruction Nos. 2.020 through 2.080 involve witnesses. Instruction No. 2.020 is the general instruction on credibility of witnesses. The Committee believes that this instruction alone is sufficient for all but the unusual case. An instruction that singles out a particular witness's credibility because, for example, he or she is an expert or a police officer, should be avoided. Nevertheless, some specific credibility instructions seemed inevitably necessary, such as Instruction No. 2.030 on adverse witnesses and Instruction No. 2.040 on expert witnesses. Cf. Virginia Model Jury Instructions—Criminal, Note 2.800 on Eyewitness Identification (discussing witness reliability in a number of different contexts, while also cautioning the practitioner that the language therein has not been accepted by the Virginia appellate courts). The same concerns that arise in the context of eyewitness identification testimony may be present in the context of photographic or audiovisual evidence.

Instruction No. 2.060 states the rule articulated in *Massie v. Firmstone, 134 Va. 450, 114 S.E. 652, 656 (1922)*, that a party's unequivocal testimony about facts within his or her knowledge are binding on him or her. The Alert in Instruction No. 2.060 explains that a motion to strike the evidence, and not an instruction, is usually the proper way to treat a situation where one is likely to request a *Massie* instruction. Instruction No. 2.080 states the general rule that a failure to produce a witness with knowledge of material facts may give rise to a permissive inference that the witness would have been unfavorable to the party that failed to call the witness. Caution should be exercised in the use of Instruction No. 2.080, as noted in its Alerts.

Instruction No. 2.090 advises the jury that a view of the scene is not evidence.

Instruction No. 2.100 explains the use of circumstantial evidence.

Instruction Nos. 2.130 through 2.210 tell the jury what it must and must not do with certain evidence. Instruction Nos. 2.130, 2.135, and 2.140 deal with the limited admissibility of evidence. During the trial, and sometimes while instructing the jury after final argument, there may be occasions when it is necessary to explain to the jury that certain evidence was admitted to prove only one of several possible issues.

Instruction Nos. 2.130, 2.135, and 2.140 cover the two most common limited admissibility situations: prior inconsistent statements and prior convictions. Instruction No. 2.130 covers prior inconsistent statements of a witness, and Instruction No. 2.135

is for use when a party's testimony at trial differs from prior statements. Instruction No. 2.140 explains the effect of prior convictions on witness credibility.

There is no general instruction stating that stipulations and admissions are binding on the jury. The jury should be fully and specifically advised on the effect of stipulations or admissions when they are introduced. For example, Instruction No. 2.135 states that the prior inconsistent statement of a party may be considered as evidence that the prior statement was true; such a statement is a party admission. Instruction No. 2.170 tells the jury to ignore rejected and stricken evidence. This instruction may be given when the evidence is stricken, and perhaps again with all instructions after final argument.

Instruction No. 2.180 is an example of the general rule that a lawyer's statements and arguments are not evidence.

Instruction No. 2.190, which covers peremptory instructions, is an example of an instruction to give when some issue is established as a matter of law.

The last two instructions in this group, Instruction Nos. 2.200 and 2.210, tell the jury that an admission of liability or a peremptory instruction striking a defense should not affect its decisions on any of the remaining issues.

The last instructions in this chapter, Instruction Nos. 2.220 through 2.250, deal with various aspects of verdicts. Instruction No. 2.220 reemphasizes that the verdict must be the result of an analysis of the proof and not a result of hunches or preconceptions. In most cases, an instruction telling the jury not to use the quotient method to reach an award should not be given. The quotient method—by which the jury reaches a monetary award by agreeing to average what each juror thinks is a proper figure—is improper. *Washington Luna Park Co. v. Goodrich, 110 Va. 692, 696–97, 66 S.E. 977, 978 (1910).* But the Committee realizes that, in most cases, an instruction telling the jury not to use the quotient method would only suggest the vice to be avoided. In condemnation cases where there is expert valuation testimony, and the danger of averaging the values testified to is greater, such an instruction is more often given. See Instruction No. 46.130, "Quotient" Award Not Permitted. Instruction No. 2.240 tells the jury that it may not return a verdict against an estate on the uncorroborated evidence of the opposition. Finally, Instruction No. 2.250 explains that an "*Allen* [*"Titcomb"*] Charge" instruction is suggested when the jury is having difficulty reaching a verdict.

This Chapter does not include an instruction addressing the spoliation of evidence statute, Va. Code Ann.§ 8.01-379.2:1. That statute imposes on a party or a potential litigant "a duty to preserve evidence that may be relevant to reasonably foreseeable litigation." Va. Code Ann. § 8.01-379.2:1(a). It further provides that:

> If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was

unfavorable to the party, or (c) dismiss the action or enter a default judgment. Va. Code Ann. § 8.01-379.2:1(b).

## Instruction No. 2.000
## Preliminary Instructions to Jury

Members of the jury, the order of the trial of this case will be in four stages:

1. Opening statements
2. Presentation of the evidence
3. Instructions of law
4. Final argument

After the conclusion of final argument, I will instruct you concerning your deliberations. You will then go to your room, select a foreperson, deliberate, and arrive at your verdict.

### Opening Statements

The plaintiff's attorney may make an opening statement outlining the plaintiff's case. Then the defendant's attorney also may make an opening statement. Neither side is required to do so.

### Presentation of the Evidence

Following the opening statements, the plaintiff will introduce evidence, after which the defendant then has the right to introduce evidence (but is not required to do so). Rebuttal evidence may then be introduced if appropriate.

### Instructions of Law

At the conclusion of all evidence, I will instruct you on the law which is to be applied to this case.

### Final Argument

Once the evidence has been presented and you have been instructed on the law, then the attorneys may make their closing arguments. The plaintiff's attorney will argue first, the defendant's attorney may reply, and the plaintiff's attorney may close in rebuttal.

Members of the jury, your function in the trial of this case is to reach a unanimous verdict that is based solely on the evidence and the instructions of law which you will be given after all the evidence has been presented. The law applicable to this case is given to you in these instructions and in the other instructions you will receive at the close of all evidence, and it is your duty to follow all such instructions.

No statement or ruling or remark that I may make during the course of the trial is intended to indicate my opinion as to what the facts are. It is the function of the jury to consider the evidence and determine the facts in this case.

The evidence which you are to consider consists of testimony of witnesses, any exhibits admitted into evidence, and any facts agreed upon between the parties and presented to you in the form of a stipulation. The admission of evidence in

**court is governed by rules of law. From time to time, it may be the duty of the attorneys to make objections, and it is my duty as judge to rule on those objections and decide whether or not you can consider certain evidence. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken. If an objection is overruled, then you may consider that evidence together with all other evidence in the case. The opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and in applying the law, but their statements are not evidence.**

**In your determination of what the facts are, you alone must determine the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case. You should not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You should use your common sense in considering the evidence, and you may draw reasonable inferences from that evidence; but in doing so, you should not indulge in guesswork or speculation. From consideration of these things and all the other circumstances of the case, you should determine which witnesses are more believable and weigh their testimony accordingly. Until this case is submitted to you for your deliberations, you should not decide any issue in the case, and you should not discuss the case with anyone or remain within hearing of anyone who is discussing it. This includes discussing the case in person, in writing, by phone or electronic means, via text messaging, e-mail, Facebook, Twitter, blogging or any Internet chat room, web site, social media, or other means. There will be occasional recesses during the trial. During the recesses, you should not discuss the case with your fellow jurors or go to the scene or make any independent investigation or receive any information about the case from radio, television, or the newspapers. Once your deliberations commence, then you must discuss the case only in the jury room when all the members of the jury are present. You are to decide this case solely on the evidence presented in this courtroom, and not on the basis of anything anyone who hasn't heard the evidence may think about this case. If you are asked or approached in any way about your jury service or anything about this case prior to rendering a verdict, you should respond that you have been ordered by the judge not to discuss the matter, and you should report the contact to the court as soon as possible.**

**Do not attempt at any time prior to the conclusion of the case to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the Internet, or by any other means or source, including dictionaries, reference books, or anything on the Internet. You must not use Internet maps, or any other program or device to search for and view any location discussed in the testimony. You must not search for any information about the**

**case, or the law which applies to the case, or the people involved in the case, including the parties, the witnesses, the lawyers, or the judge. Your sworn duty is to decide the case solely and wholly on the evidence presented in this courtroom. You must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social web sites. I expect you will inform me if you become aware of another juror's violation of these instructions.**

**Just prior to your deliberations, you will be given final instructions with regard to your selection of a leader, the conduct of your deliberations, and the forms for your verdict.**

**The faithful and proper performance by you of your duty is vital to the administration of justice. On behalf of the court and the litigants, we appreciate your giving your complete attention to the case as it is presented.**

**Thank you.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** This instruction was compiled from a number of sources; there is no one case that authorizes it, and citation to all the individual sources would be tedious and not helpful.

## PRACTICE COMMENTARY

At the start of the term, most jurors are strangers to the courtroom. After the jury has been selected and sworn, and before the opening statements of counsel, the members of the jury should be told what the function of a jury is and the procedure of the trial.

The court should do everything it can to help the jurors feel comfortable in the courtroom and understand what will happen during the trial so that they may concentrate on the evidence as it is presented.

***ALERTS:***

None

## Instruction No. 2.020
## Credibility of Witnesses

**You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.**

**You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.**

**You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**PRINCIPAL CASE AUTHORITY:** *Williams v. Auto Brokers, 6 Va. App. 570, 574, 370 S.E.2d 321, 323–24 (1988)*; *Diggs v. Lail, 201 Va. 871, 878, 114 S.E.2d 743, 748–49 (1960)*; *Zirkle v. Commonwealth, 189 Va. 862, 870, 55 S.E.2d 24, 29 (1949)*; *Low Moor Iron Co. v. Jackson, 117 Va. 76, 84, 84 S.E.100, 102 (1915).*

**OTHER RELEVANT DECISIONS:** *Elliott v. Commonwealth, 277 Va. 457, 462, 675 S.E.2d 178, 181 (2009)*; *James v. Commonwealth, 254 Va. 95, 98, 487 S.E.2d 205, 207 (1997)*; *Hodge v. American Family Life Assur. Co., 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972)*; *Smith v. Wright, 207 Va. 482, 486, 151 S.E.2d 359, 363 (1966).*

### PRACTICE COMMENTARY

"The credibility of the witnesses and the weight accorded the evidence" have long been recognized as "matters solely for the fact finder who has the opportunity to see and hear the evidence as it is presented," including the appearance and manner of witnesses on the stand. *Elliott, 277 Va. at 462, 675 S.E.2d at 181.* Moreover, when there are conflicts and discrepancies in the evidence, it is the jury's job to resolve them. If the differences cannot be resolved, the jury has the right to decide which witnesses to believe. *Diggs, 201 Va. at 877, 114 S.E.2d at 748.*

In *Low Moor Iron Co.*, an instruction telling the jurors to consider the accuracy of the witness's recollections, the witness's interest in the case, and the reasonableness and consistency of the evidence was held to have been properly given. The instruction was approved as "correctly and sufficiently indicat[ing] how the duties of the jury in ascertaining and determining the credibility of witnesses should be performed" in cases where there are conflicts and discrepancies in the evidence. *117 Va. at 83–84, 84 S.E. at 102–103.*

In *Diggs*, the Supreme Court of Virginia held that the trial court committed reversible error in refusing to give an instruction featuring language similar to that appearing in the model instruction where there were "serious conflicts in the evidence." *201 Va. at 878, 114 S.E.2d at 748–49.*

In *Williams*, the Court of Appeals of Virginia approved the list of factors pertaining to what jurors may consider in making credibility determinations about witnesses as set out in the first paragraph of the model instruction. *6 Va. App. at 574, 370 S.E.2d at 323–24.*

☞ ***PRACTICE POINTER:*** For a discussion of additional cases supporting the language of this model instruction in a criminal context, see the Sources & Authority statement for Virginia Model Jury Instructions-Criminal, No. 2.500 (Credibility of Witnesses).

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 13.7

MICHIE'S JURISPRUDENCE, Evidence §§ 45 through 48, 50, 52-54; Witnesses §§ 53-67, 71-79

## Instruction No. 2.030
## Adverse Witness

**The plaintiff called the defendant as an adverse witness. The plaintiff is bound by as much of the defendant's testimony given as an adverse witness as is clear, logical, reasonable, and uncontradicted.**

**The plaintiff is not bound by any of the defendant's testimony given as an adverse witness that conflicts with any of the other evidence in the case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Owens v. DRS Automotive Fantomworks, Inc., 288 Va. 489, 495–96, 764 S.E.2d 256, 259–60 (2014)*; *Economopoulos v. Kolaitis, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000)*; *Retail Prop. Investors v. Skeens, 252 Va. 36, 41, 471 S.E.2d 181, 183 (1996)*; *Nationwide Mut. Ins. Co. v. Hargraves, 242 Va. 88, 91–92, 405 S.E.2d 848, 850–51 (1991)*; *Miller v. White, 222 Va. 311, 315, 281 S.E.2d 802, 804 (1981)*; *S & W Motor Lines, Inc. v. Bayliss, 212 Va. 124, 125, 183 S.E.2d 169, 169 (1971)*; *Cook v. Basnight, 207 Va. 491, 497, 151 S.E.2d 408, 412 (1966)*; *Weddle v. Draper, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963)*; *Norfolk & Portsmouth Belt Line R.R. Co. v. C.F. Mueller Co., 197 Va. 533, 539, 90 S.E.2d 135, 139 (1955)*; *Boyd v. Brown, 192 Va. 702, 711, 66 S.E.2d 559, 564 (1951).*

### PRACTICE COMMENTARY

It is well settled that when a defendant testifies as an adverse witness, the plaintiff is bound by such testimony that is reasonable and uncontradicted. However, the plaintiff does not make the adverse party his own witness. The conclusion is the same where a party introduces deposition testimony of an adverse party under *Va. Sup. Ct. R. 4:7(C). Thornton v. Glazer, 271 Va. 566, 571–72, 628 S.E.2d 327, 330 (2006).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 40.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 11-8, 11-11

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 13.7

MICHIE'S JURISPRUDENCE, Witnesses §§ 33, 36 through 45

## Instruction No. 2.040
## Expert Witness

**In considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion and the manner by which he arrived at it** [and the underlying facts and data upon which he relied]**.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-401.1.

**Case Authority:** *Street v. Street, 25 Va. App. 380, 387–89, 488 S.E.2d 665, 668–70 (1997)*; *McLane v. Commonwealth, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960)*; *Opanowich v. Commonwealth, 196 Va. 342, 354–55, 83 S.E.2d 432, 439 (1954)*; *Reed v. Church, 175 Va. 284, 298, 8 S.E.2d 285, 290 (1940)*.

## Practice Commentary

Expert testimony is admissible in civil cases if it assists the trier of fact and is based on an adequate factual foundation. It is inadmissible if it is speculative, is based on assumptions that have inadequate factual basis, or fails to consider all the variables that bear on the inferences deduced from the facts. *Hyundai Motor Co. v. Duncan, 289 Va. 147, 154–56, 766 S.E.2d 893, 897 (2015)*; *Riverside Owner, L.L.C. v. City of Richmond, 282 Va. 62, 74, 711 S.E.2d 533, 539–40 (2011)*.

The jury is not required to accept the testimony of an expert witness merely because he or she has qualified as an expert. See *Street, 25 Va. App. at 387, 488 S.E.2d at 668*. The evidence of an expert witness should be given the same consideration as is given any other witness, considering his or her opportunity for knowledge of the subject, appearance, conduct, and demeanor on the stand. *McLane, 202 Va. at 206, 116 S.E.2d at 281*. The jury should determine the weight to be given to an expert's testimony by considering the facts upon which his or her opinions are based and the soundness of the opinions.

☞ ***Practice Pointer:*** Va. Code Ann. § 8.01-401.1 governs the admissibility of statements contained in published treatises and other items relied upon by an expert in forming his opinion. Under this statute, the contents of learned treatises relied upon by an expert may be read into the record as substantive evidence. *May v. Caruso, 264 Va. 358, 361–62, 568 S.E.2d 692 (2002)*; *Weinberg v. Given, 252 Va. 221, 226, 476 S.E.2d 502, 504 (1996)*.

Two preconditions must exist before hearsay expert opinions contained in published articles may be admitted as substantive evidence on direct examination. First, the testifying witness must have "relied upon" the article in forming his opinion, which is consistent with the views expressed by the author; and second, the article must be established as "a reliable authority" by testimony or by stipulation. *Bostic v. About Women OB/GYN, P.C., 275 Va. 567, 576–77, 659 S.E. 2d 290, 294–95 (2008)*.

The fact that under Va. Code Ann. § 8.01-401.1 an expert witness may rely upon otherwise inadmissible evidence does not mean that an opinion based upon inadmissible evidence is necessarily admissible: if the opposing party objects, the court must still determine whether the expert's opinion is admissible. *Funkhouser v. Ford Motor Co., 285 Va. 272, 284–85, 736 S.E.2d 309, 316 (2013)*.

***ALERTS:***

- Va. Code Ann. § 8.01-401.1 applies only to civil cases. *Sanders v. Common-*

*wealth, 282 Va. 154, 159 n.1, 711 S.E.2d 213, 215 n.1 (2011).*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 40.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 13-6 through 13-16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 13.7

MICHIE'S JURISPRUDENCE, Evidence §§ 165 through 177

## Instruction No. 2.060
## Party Bound by His Own Testimony

**When one of the parties testifies unequivocally to facts within his own knowledge, those statements of fact and the necessary inferences from them are binding upon him. He cannot rely on other evidence in conflict with his own testimony to strengthen his case.**

**However, you must consider his testimony as a whole, and you must consider a statement made in one part of his testimony in the light of any explanation or clarification made elsewhere in his testimony.**

[Note: THIS INSTRUCTION SHOULD RARELY BE GIVEN. See *ALERTS* to Instruction No. 2.060.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & W. Ry. v. Chittum, 251 Va. 408, 413, 468 S.E.2d 877, 880 (1996)*; *Braden v. Isabell K. Horsley Real Estate, Ltd., 245 Va. 11, 12–13, 425 S.E.2d 481, 481 (1993)*; *Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 55, 419 S.E.2d 627, 629 (1992)*; *Hogan v. Carter, 226 Va. 361, 370, 310 S.E.2d 666, 671 (1983)*; *Ford Motor Co. v. Bartholomew, 224 Va. 421, 431, 297 S.E.2d 675, 680 (1982)*; *Baines v. Parker, 217 Va. 100, 104–05, 225 S.E.2d 403, 406–07 (1976)*; *Saunders v. Bulluck, 208 Va. 551, 553, 159 S.E.2d 820, 823 (1968)*; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Bruce, 208 Va. 595, 599–600, 159 S.E.2d 815, 818–19 (1968)*; *Smith v. Virginia Elec. & Power Co., 204 Va. 128, 134, 129 S.E.2d 655, 660 (1963)*; *Virginia Elec. & Power Co. v. Mabin, 203 Va. 490, 493–94, 125 S.E.2d 145, 147–48 (1962)*; *Crew v. Nelson, 188 Va. 108, 112–14, 49 S.E.2d 326, 328–29 (1948)*; *Massie v. Firmstone, 134 Va. 450, 462, 114 S.E. 652, 656 (1922).*

### PRACTICE COMMENTARY

For illustration of what is meant by statement of fact within knowledge of the witness, see *Ford Motor Co.* and *Ravenwood Towers.*

☞ ***PRACTICE POINTER:*** In *Braden, 245 Va. at 16–17, 425 S.E.2d at 484*, the Court explained that the *Massie* doctrine applies "only to a . . . litigant's statements of fact that are within the litigant's own knowledge" and *not* to any of the following:

- Statements of opinion. *Erlich v. Hendrick Constr. Co., 217 Va. 108, 114, 225 S.E.2d 665, 669 (1976).*
- Statements made by a party concerning matters beyond the party's realm of knowledge. *Charlton v. Craddock-Terry Shoe Corp., 235 Va. 485, 489, 369 S.E.2d 175, 177 (1988).*
- Equivocal statements. *Clayton v. Taylor, 193 Va. 555, 560–61, 69 S.E.2d 424, 428–29 (1952).*
- Adverse statements considered in isolation from a party's testimony as a whole. *Travis v. Bulifant, 226 Va. 1, 5, 306 S.E.2d 865, 867 (1983).*

☞ ***PRACTICE POINTER:*** *Hogan* held that the *Massie v. Firmstone* rule, as relevant to actions in tort, is that "a litigant whose testimony, considered as a whole, conclusively absolves an alleged tortfeasor of actionable negligence forfeits the cause of action against him or, as the case may be, the defense of contributory negligence" but noted that "the rule does not apply to mere estimates of fact, such as speed and distance, or to other statements of opinion." *226 Va. at 370, 310 S.E.2d at 671.*

### ***ALERTS:***

- The *Massie v. Firmstone* rule is well known to most trial lawyers. That familiarity seemed to demand an instruction on the rule. It is important to

remember, however, that the *Massie* case and most cases where *Massie* is cited are ones where a motion to strike the evidence either was or should have been granted because of a party's in-court admissions. In other words, the *Massie v. Firmstone* rule is not generally the subject of a jury instruction. As explained in *Ford Motor Co.*, "the *Massie* doctrine is not to be read as a rule of thumb, categorical, absolute, and universally applicable." *224 Va. at 431, 297 S.E.2d at 680.* Thus the rule, as embodied in the model instruction, should be applied only where the specific circumstances recognized in prior cases as warranting it are present. Otherwise, its application is reversible error. *Braden, 245 Va. at 17, 425 S.E.2d 484; TransiLift Equip., Ltd. v. Cunningham, 234 Va. 84, 94–95, 360 S.E.2d 183, 189 (1987).*

## Instruction No. 2.080
## Unexplained Failure to Produce Important Witness

**If you believe that a party, without explanation, failed to call an available witness who has knowledge of necessary and material facts, you may, but are not required to, infer that witness's testimony would have been unfavorable to the party who failed to call the witness.**

[Note: THIS INSTRUCTION SHOULD RARELY BE GIVEN. See *ALERTS* to Instruction No. 2.080.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Faison v. Hudson, 243 Va. 397, 406, 417 S.E.2d 305, 310 (1992)*; *Banks v. Harris, 238 Va. 81, 84, 380 S.E.2d 634, 636 (1989)*; *Harper v. B & W Bandag Center, Inc., 226 Va. 469, 471–72, 311 S.E.2d 104, 105–06 (1984)*; *Neeley v. Johnson, 215 Va. 565, 573, 211 S.E.2d 100, 107 (1975)*; *Barnette v. Dickens, 205 Va. 12, 16, 135 S.E.2d 109, 113 (1964).*

### PRACTICE COMMENTARY

Commonly referred to as the "missing witness" instruction, a party's request to give it should be granted only where that party establishes a prima facie case that the absent witness is available and that his or her testimony would be material. Availability means the power of the party to produce the witness, and depends upon the facts of the case. *Neeley, 215 Va. at 573, 211 S.E.2d at 108.* "Materiality in this context means that the person's testimony has 'a certain or probable bearing on the proper determination of' the case. The testimony of a possible witness which is 'for any reason comparatively unimportant, or cumulative, or inferior to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension [that the inference would be drawn.]' " *Id. at 574, 211 S.E.2d at 108.* Further, when given, the instruction must be customized so as not to permit the jury to draw impermissible inferences. *Harper, 226 Va. at 471–72, 311 S.E.2d at 105–06*; *Neeley, 215 Va. at 573–76, 211 S.E.2d at 107–09.*

### *ALERTS:*

- The instruction on the failure to produce witnesses appears to be an artifact from a prior legal era, susceptible to abuse by litigants and to serving as grounds for reversal when given. See, e.g., *Harper, 226 Va. at 473, 311 S.E.2d at 107*; *Banks, 238 Va. 84, 380 S.E.2d 636*; *Neeley, 215 Va. at 576, 211 S.E.2d at 109.* The Model Jury Instruction Committee therefore urges caution in the use of this instruction.

- The inference set forth in this instruction can be found in judicial statements dating from before the time of Lord Mansfield. In contrast to that era of "trial by ambush," modern discovery practices provide litigants the means to ascertain the identities of all persons known by all parties to have knowledge of material facts and to ascertain precisely what that knowledge is. Those witnesses can also be compelled to appear at trial to testify upon the request of any party. As a result, rarely is a witness not equally available to all parties in a case. As the Court pointed out in *Neeley*, the inference therefore would be equally applicable to all parties in the case. *215 Va. at 574, 211 S.E.2d at 107.* See also *Harper, 226 Va. at 473, 311 S.E.2d at 107.* To instruct the jury in such circumstances that the inference should be drawn against one party alone, therefore, would be manifestly unfair. *Id.*

- This instruction cannot be given in criminal cases. *Russell v. Commonwealth, 216 Va. 833, 836–37, 223 S.E.2d 877, 879 (1976).* Although the instruction may yet

have limited vitality in a civil case, its use in civil cases was severely criticized in the concurring opinions of *Harper, 226 Va. at 473–74, 311 S.E.2d at 106–07*, ("The instruction is frequently sought to obtain an unfair advantage") and *Banks, 238 Va. at 84, 380 S.E.2d at 636* (the "missing witness" instruction has outlived its usefulness and should constitute error in any case in which it is granted).

## Instruction No. 2.090
## Jury View

**The purpose of taking you to view the scene** [premises] **was to clarify and explain the evidence which was introduced at trial, not to supply evidence. You must restrict your consideration to the evidence presented in court.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-376.

**Case Authority:** *Culpepper v. Neff, 204 Va. 800, 806, 134 S.E.2d 315, 319–20 (1964)*; *Kearns v. Hall, 197 Va. 736, 741, 91 S.E.2d 648, 651–52 (1956)*; *P. Lorillard Co. v. Clay, 127 Va. 734, 743–44, 104 S.E. 384, 387 (1920).*

### Practice Commentary

In any civil case, at the request of either party, the jury may be taken to view the premises in question when in the discretion of the court a jury view is necessary to a just decision. Va. Code Ann. § 8.01-376. See *Abernathy v. Emporia Mfg. Co., 122 Va. 406, 424, 95 S.E.2d 418, 423 (1918)* (upholding refusal to order a view).

### *ALERTS:*

None.

## Instruction No. 2.100
## Circumstantial Evidence

**Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Britt v. Commonwealth, 276 Va. 569, 573, 667 S.E.2d 763, 765 (2008)*; *Etherton v. Doe, 268 Va. 209, 212–13, 597 S.E.2d 87, 89 (2004)*; *Commonwealth v. Hudson, 265 Va. 505, 512–13, 578 S.E.2d 781, 785 (2003)*; *Smith v. Commonwealth, 247 Va. 157, 159, 439 S.E.2d 409, 411 (1994)*; *Bailey v. Kerns, 246 Va. 158, 163–67, 431 S.E.2d 312, 315–18 (1993)*; *Wooldridge v. Echelon Serv. Co., 243 Va. 458, 461, 416 S.E.2d 441, 443 (1992)*; *Fobbs v. Webb Bldg. Ltd. P'ship, 232 Va. 227, 230, 349 S.E.2d 355, 357 (1986)*; *Northern Virginia Power Co. v. Bailey, 194 Va. 464, 470–71, 73 S.E.2d 425, 429 (1952)*; *Toler v. Commonwealth, 188 Va. 774, 780, 51 S.E.2d 210, 213 (1949)*; *Bly v. Southern R. Co., 183 Va. 162, 175–76, 31 S.E.2d 564, 570 (1944)*; *Ryan v. Maryland Cas. Co., 173 Va. 57, 62, 3 S.E.2d 416, 418 (1939)*.

### PRACTICE COMMENTARY

"[F]acts need not be proved by *direct* evidence, but instead, may be established by *circumstantial* evidence." *Fobbs, 232 Va. at 230, 349 S.E.2d at 357*. Circumstantial evidence is "proof of a series of other facts than the fact in issue, which by experience have been found so associated with that fact, that, in the relation of cause and effect, they lead to a satisfactory and certain conclusion." *Ryan, 173 Va. at 62, 3 S.E.2d at 418*. There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence: circumstantial evidence, if convincing, is entitled to the same weight as direct evidence. *Hudson, 265 Va. at 512*; *Britt v. Commonwealth, 276 Va. 569, 573, 667 S.E.2d 781, 785 (2008)*. The jury is entitled to consider all of the evidence, without distinction, in reaching its determination. *Government Empls. Ins. Co. v. United Servs. Auto. Ass'n, 281 Va. 647, 656, 708 S.E.2d 877, 882 (2011)*.

Circumstantial evidence "is offered to prove a fact not directly in issue, from which a fact in issue may reasonably be inferred." *Hudson, 265 Va. at 512, 578 S.E.2d at 785*. However, "[i]n order for inferences to amount to evidence they must be inferences based on facts that are proved, and not inferences based on other inferences." *Smith, 247 Va. at 159, 439 S.E.2d at 411*.

☞ ***PRACTICE POINTER:*** For a discussion of additional cases supporting the language of this model instruction in a criminal context, see the Sources & Authority statement for Virginia Model Jury Instructions-Criminal, No. 2.400 (Circumstantial Evidence).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 1-3[c], 7-1 through 7-14

MICHIE'S JURISPRUDENCE, Evidence §§ 35, 40, 41, 284

## Instruction No. 2.130
## Prior Inconsistent Statement by Witness

**If you believe from the evidence that a witness** [other than a party] **previously made a statement inconsistent with his testimony at this trial, the only purpose for which the statement may be considered by you is its bearing on the witness's credibility. It is not evidence that what the witness previously said is true.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 8.01-403, 8.01-404.

**Case Authority:** *Ruhlin v. Samaan, 282 Va. 371, 378–79, 718 S.E.2d 447, 450–51 (2011)*; *Gray v. Rhoads, 268 Va. 81, 89–90, 597 S.E.2d 93, 98 (2004)*; *Commercial Distribs., Inc. v. Blankenship, 240 Va. 382, 394, 397 S.E.2d 840, 847 (1990)*; *Royal v. Commonwealth, 234 Va. 403, 405, 362 S.E.2d 323, 324 (1987)*; *Hall v. Commonwealth, 233 Va. 369, 374–75, 355 S.E.2d 591, 594–95 (1987)*; *Shelton v. Mullins, 207 Va. 17, 21–22, 147 S.E.2d 754, 757 (1966)*.

### Practice Commentary

The purpose of this instruction is to explain the limited basis on which the prior inconsistent statement was admitted, not to instruct on the effect it has on the witness's credibility. Instruction No. 2.020 (Credibility of Witnesses) is adequate for the latter purpose.

Before extrinsic evidence of a prior inconsistent statement is admissible, the statement must be mentioned to the witness and he must be asked whether or not he made such a statement. Va. Code Ann. § 8.01-403. For a discussion on the admissibility of prior consistent statements of witnesses, see *Anderson v. Commonwealth, 282 Va. 457, 717 S.E.2d 623 (2011)*.

While Va. Code Ann. § 8.01-404 prevents the impeachment of a witness by the use of an affidavit, statement, or transcript made after an accident, it does not prevent proof of prior inconsistent statements by oral testimony, even when such statements were reduced to writing and signed by the witness. Also, the signed statement may be used to refresh the recollection of the witness. *Ruhlin, 282 Va. at 378–79, 718 S.E.2d at 450–51*.

☞ ***Practice Pointer:*** The bracketed language in this instruction should be used in cases where the instruction is given as to a witness other than a party and a party has also testified inconsistently with prior statements that have been admitted as party admissions.

☞ ***Practice Pointer:*** For a discussion of additional cases supporting the language of this model instruction in a criminal context, see the Sources & Authority statement for Virginia Model Jury Instructions-Criminal, No. 2.560 (Prior Inconsistent Statement of Witness).

### *ALERTS:*

- If the witness is a party, use Instruction No. 2.135.
- In *Royal*, the Supreme Court of Virginia held that it was error for the trial court to refuse a requested instruction, which, as described, featured language similar to that appearing in the model instruction. *234 Va. at 405–06, 362 S.E.2d at 324*. In *Hall*, the Court held that the instruction must be given, if requested, even though the inconsistent statement may not have been formally admitted in evidence. *233 Va. at 375, 355 S.E.2d at 595*.
- A guilty plea entered in district court that has been annulled by an appeal to

circuit court is not admissible in a civil proceeding as a prior inconsistent statement. *Santen v. Tuthill, 265 Va. 492, 497, 578 S.E.2d 788, 791 (2003).*

- Applying Va. Code Ann. § 8.01-404, the Supreme Court used the facts of the *Gray* case to note the following distinction between using a statement as a party admission and using it as a prior inconsistent statement:

> The plain terms of Va. Code Ann. § 8.01-404 limit the application of the prohibition at issue to those situations where a prior written statement is used to "contradict" a witness. In the specific context of the present case, that was not the result. The plaintiff sought to introduce the transcripts of the Officers' prior audio-recorded statements as party admissions in the plaintiff's case-in-chief. At that point in the trial, the Officers would not have been testifying as witnesses nor would they have previously testified. Thus, the statements would not have been used to "contradict" the Officers because they would not yet have been witnesses and might never have been. If the Officers had already testified and, thereafter, the prior audio-recorded statements had been offered as evidence, they would have been properly refused. Notwithstanding that the statements constituted party admissions, their effect, in that circumstance, would have been to contradict the witnesses and Va. Code Ann. § 8.01-404 would not have permitted their introduction.

*Gray, 268 Va. at 89, 597 S.E.2d at 98.*

***RESEARCH REFERENCES:***

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Evidence § 53; Witnesses §§ 54, 56 through 63, 71, 74, 278

**Instruction No. 2.135**
**Prior Inconsistent Statement by Party**

**If you believe from the evidence that a party previously made a statement inconsistent with his testimony at this trial, that previous statement may be considered by you as evidence that what the party previously said was true.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 8.01-403, 8.01-404.

**Principal Case Authority:**

*Groggins v. Commonwealth, 34 Va. App. 19, 23–25, 537 S.E.2d 605, 607–08 (2000).*

**Other Relevant Decisions:** *Ruhlin v. Samaan, 282 Va. 371, 378–79, 718 S.E.2d 447, 450–51 (2011)*; *Gray v. Rhoads, 268 Va. 81, 89–90, 597 S.E.2d 93, 98 (2004)*; *Shelton v. Mullins, 207 Va. 17, 21–22, 147 S.E.2d 754, 757 (1966).*

### Practice Commentary

In *Groggins*, the Court of Appeals held that an instruction featuring language substantially identical to that appearing in the model instruction was "a correct statement of law" and that it was properly given under the facts of that case. *34 Va. App. at 23–25, 537 S.E.2d at 607–08.*

A party's prior statement may be considered substantive evidence as a party admission. *Gray, 268 Va. at 89–90, 597 S.E.2d at 98.*

While Va. Code Ann. § 8.01-404 prevents the impeachment of a witness by the use of an affidavit, statement or transcript made after an accident, it does not prevent proof of prior inconsistent statements by oral testimony, even when such statements were reduced to writing and signed by the witness. Also, the signed statement may be used to refresh the recollection of the witness. *Ruhlin, 282 Va. at 378–79, 718 S.E.2d at 450–51.*

***PRACTICE POINTER:*** For a discussion of additional cases supporting the language of this model instruction in a criminal context, see the Sources & Authority statement for Virginia Model Jury Instructions-Criminal, No. 2.580 (Prior Inconsistent Statement of Defendant).

### *ALERTS:*

- This instruction is to be used only in regard to a party's testimony where evidence has been introduced that the party made a prior inconsistent statement. For testimony of other witnesses, use Instruction No. 2.130.

- A guilty plea entered in district court that has been annulled by an appeal to circuit court is not admissible in a civil proceeding as a prior inconsistent statement. *Santen v. Tuthill, 265 Va. 492, 497, 578 S.E.2d 788, 791 (2003).*

- The Virginia Supreme Court noted the following distinction between using a statement as a prior inconsistent statement and using it as a party admission.

> The plain terms of Va. Code Ann. § 8.01-404 limit the application of the prohibition at issue to those situations where a prior written statement is used to "contradict" a witness. In the specific context of the present case, that was not the result. The plaintiff sought to introduce the transcripts of the Officers' prior audio-recorded statements as party admissions in the plaintiff's case-in-chief. At that point in the trial, the Officers would not have been testifying as witnesses nor

would they have previously testified. Thus, the statements would not have been used to "contradict" the Officers because they would not have been witnesses and might never have been. If the Officers had already testified and, thereafter, the prior audio-recorded statements had been offered as evidence, they would have been properly refused. Notwithstanding that the statements constituted party admissions, their effect, in that circumstance, would have been to contradict the witnesses and Va. Code Ann. § 8.01-404 would not have permitted their introduction.

*Gray, 268 Va. at 89, 597 S.E.2d at 98.*

***RESEARCH REFERENCES:***

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Evidence § 53; and Witnesses §§ 54, 56 through 63, 71, 74, 278

## Instruction No. 2.140
## Prior Conviction of Felony or Crime Involving Moral Turpitude

**During the trial, proof that a witness had been convicted of** [a felony; perjury; a crime involving moral turpitude] **was admitted. The only purpose for which that evidence may be considered by you is its bearing on the witness's credibility. It does not render him incompetent to testify.**

**You may not consider that evidence as proof of any other issue in this case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 19.2-269.

**CASE AUTHORITY:** *Jewel v. Commonwealth, 260 Va. 430, 433, 536 S.E.2d 905, 906 (2000)*; *Payne v. Carroll, 250 Va. 336, 339–40, 461 S.E.2d 837, 838–39 (1995)*; *Bland v. Commonwealth, 177 Va. 819, 823, 13 S.E.2d 317, 318 (1941).*

### PRACTICE COMMENTARY

Prior to adoption of the rule set forth in Va. Code Ann. § 19.2-269, a person convicted of a felony or perjury was prohibited from testifying unless he or she was pardoned or had endured his or her punishment. *Lincoln v. Commonwealth, 217 Va. 370, 374, 228 S.E.2d 688, 690 (1976)*; *Epes' Adm'r v. Hardaway, 135 Va. 80, 88, 115 S.E. 712, 715 (1923).*

In addition to showing convictions for "felony or perjury," the credibility of a witness may also be attacked by showing that he or she has been convicted of a misdemeanor involving moral turpitude or affecting the witness's character for veracity. A crime involves moral turpitude only if it is *crimen falsi*—involving deception, trickery, forgery, lying, cheating, or stealing. *Chrisman v. Commonwealth, 3 Va. App. 89, 97, 348 S.E.2d 399, 403 (1986).* Moral turpitude is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Tasker v. Commonwealth, 202 Va. 1019, 1024, 121 S.E.2d 459, 463 (1961)*; *Parr v. Commonwealth, 198 Va. 721, 723–26, 96 S.E.2d 160, 163–64 (1957).* The only misdemeanors which the Supreme Court of Virginia has said involve moral turpitude are making a false statement and petit larceny. *Chesapeake & Ohio Ry. Co. v. Hanes, 196 Va. 806, 813, 86 S.E.2d 122, 126 (1955)* (false statement); *Bell v. Commonwealth, 167 Va. 526, 189 S.E. 441 (1937)* (petit larceny). Indecent exposure is not a crime of moral turpitude for this purpose, since it does not relate to veracity. *Chrisman, 3 Va. App. at 100, 348 S.E.2d at 405.* A misdemeanor involving distribution of marijuana is not a crime of moral turpitude, and therefore may not be shown to impeach. *Newton v. Commonwealth, 29 Va. App. 433, 448, 512 S.E.2d 846, 853 (1999).* In addition, charges not involving a conviction are inadmissible for impeachment purposes. *Id.*

☞ ***PRACTICE POINTER:*** When a felon testifies and evidence of his or her conviction is admitted to affect his or her credibility, the court has a duty to instruct the jury "of the restricted purpose for which the evidence is admitted." *Bland, 177 Va. at 823, 13 S.E.2d at 318.* There is no reason to instruct the jury that the witness is competent to testify.

☞ ***PRACTICE POINTER:*** For a discussion of additional cases supporting the language of this model instruction in a criminal context, see the Sources & Authority statement for Virginia Model Jury Instructions-Criminal, No. 2.540

(Prior Conviction of Felony or Crime Involving Moral Turpitude).

***ALERTS:***

- A felon may testify in a civil case but the fact of his or her conviction may be shown to affect his or her credibility. Va. Code Ann. § 19.2-269; *Furrow v. State Farm Mut. Auto. Ins. Co., 237 Va. 77, 81, 375 S.E.2d 738, 740 (1989)*; *Epes, 135 Va. at 87, 115 S.E. at 715*. In a civil case, only the fact of a conviction may be shown against a party-witness, unless the witness is not truthful in answering. The details and name of the crime, other than perjury, may not be inquired into. *Payne, 250 Va. at 339–40, 461 S.E.2d at 838–39.*

- The only convictions that can be inquired into are those for a felony, a crime involving moral turpitude, or a crime that involved the character of the witness for veracity. See generally *Chrisman, 3 Va. App. 89, 348 S.E.2d 399.*

- A prior conviction includes a guilty plea accepted by a trial court even though no final order had been entered stating a finding of guilt or imposing sentence. *Jewel, 260 Va. at 433, 536 S.E.2d at 906.* However, on a not guilty plea there is no prior conviction until sentencing. *Ramdass v. Commonwealth, 248 Va. 518, 520–21, 450 S.E.2d 360, 361 (1994).*

***RESEARCH REFERENCES:***

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-4, 8-4A, 12-4, 12-5

MICHIE'S JURISPRUDENCE, Evidence §§ 47, 48; Witnesses §§ 39, 64–66

## Instruction No. 2.170
## Rejected and Stricken Evidence

**You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Jordan v. Taylor, 209 Va. 43, 49, 161 S.E.2d 790, 794 (1968)*; *Eubank v. Spencer, 203 Va. 923, 925, 128 S.E.2d 299, 301 (1962)*; *Fardis & Boudouris v. E.I. DuPont de Nemours & Co., 123 Va. 88, 90–91, 96 S.E. 164, 164–65 (1918).*

### PRACTICE COMMENTARY

The language of this model instruction is identical to that given in criminal cases. See Virginia Model Jury Instructions-Criminal, No. 2.360 (Rejected and Stricken Matter). This instruction enables the court to take from the jury evidence that was conditionally received and stricken when the conditions were not fulfilled. *Fardis & Boudouris, 123 Va. at 90–91, 96 S.E. at 164–65.*

For example, in *Norfolk Southern Railroad Co. v. Banks*, the court conditionally admitted testimony that a warning was given. The court later struck that evidence because no evidence was produced that the plaintiff heard the warning. In a modified form, it may be used to correct erroneous rulings on evidence. *141 Va. 715, 126 S.E. 662 (1925).*

☞ ***PRACTICE POINTER:*** If the evidence bears on a major point at issue in the case, it may be advisable to mention the evidence, or at least to categorize it to call it to mind, and then to tell the jury to disregard it.

### *ALERTS:*

- A more specific peremptory instruction than this one may be necessary where it is possible that the jury will speculate over an illusory issue. For example, where the only evidence of intoxication was a trooper's testimony that two hours after the accident the defendant had a "beerish type of alcohol" smell about his person, the trial judge instructed the jury "there is no evidence of intoxication or use of alcohol by the defendant, . . . and you shall not consider same in arriving at your verdict." *Jordan, 209 Va. at 49, 161 S.E.2d at 794.*

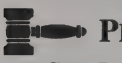
## Instruction No. 2.180
## Amount Sued for Is Not Evidence

**Any amount of damages requested is not evidence in this case; you should not consider it as evidence in arriving at your verdict.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-379.1.

**Case Authority:** *Wakole v. Barber, 283 Va. 488, 492–96, 722 S.E.2d 238, 240–42 (2012)*; *Bell v. Kirby, 226 Va. 641, 645, 311 S.E.2d 799, 801–02 (1984)*; *Government Empls. Ins. Co. v. Gallop, 224 Va. 720, 726, 299 S.E.2d 525, 528 (1983)*; *State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 272, 163 S.E.2d 181, 186 (1968)*; *Phillips v. Fulghum, 203 Va. 543, 546–47, 125 S.E.2d 835, 837–38 (1962)*.



### Practice Commentary

See Instruction No. 9.000, General Personal Injury and Property Damages.

As long as there is evidence to support an award of non-economic damages, the plaintiff is allowed to break the lump sum amount into its component parts and argue a fixed amount for each element of damages claimed if the amount is not based on a per diem or other fixed basis. *Wakole, 283 Va. at 494, 722 S.E.2d at 241*.

☞ ***Practice Pointer:*** Va. Code Ann. § 8.01-379.1 allows for either party to mention the amount of damages sought in the opening statement, closing argument, or both. The plaintiff may request an amount less than the *ad damnum* in the complaint.

As to circumstances under which a litigant is entitled to have the trial court give this instruction, see *Phillips, 203 Va. at 546–47, 125 S.E.2d at 837–38*.

### *ALERTS:*

- In *Government Employees Insurance Co.*, the Court, reversing on another ground, did not have to consider an assignment of error questioning the failure of the trial court to instruct the jury that mention of the amount sued for is not evidence and should not be considered, but did "invite attention" to *Phillips, 203 Va. at 546–47, 125 S.E.2d at 837–38. 224 Va. at 726, 125 S.E. 2d at 528.*

**Instruction No. 2.190**
**Peremptory Instruction**

**As a matter of law, the defendant was negligent** [and his negligence was a proximate cause of the accident].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Schlimmer v. Poverty Hunt Club, 268 Va. 74, 597 S.E.2d 43 (2004)*; *White v. John Doe, 207 Va. 276, 279, 148 S.E.2d 797, 799 (1966)*; *Virginia Transit Co. v. Tidd, 194 Va. 418, 425, 73 S.E.2d 405, 410 (1952).*

### PRACTICE COMMENTARY

As discussed in the cases cited above, a statutory violation does not axiomatically constitute negligence per se. For a discussion of negligence per se, see *Parker v. Carilion Clinic, 296 Va. 319, 345–46, 819 S.E.2d 809, 824–25 (2018).*

☞ ***PRACTICE POINTER:*** See Instructions No. 2.200, Effect of Admitting Liability, and 2.210, Effect of Striking Defense, for two examples of cautionary instructions that might be given after a peremptory instruction.

### *ALERTS:*

- This is simply an example of a peremptory instruction. What peremptory instructions the court gives to the jury depend upon what issues have been conceded or established as a matter of law.

## Instruction No. 2.200
## Effect of Defendant Admitting Liability

**The defendant has admitted that he is liable for any injury the plaintiff received from the accident. Therefore, the only issue that you have to decide is the amount of damages[, if any,] the plaintiff is entitled to recover.**

**An admission of liability should not influence you in any way in considering the issue of damages.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *MacDonald v. Firth, 202 Va. 900, 901 n.1, 121 S.E.2d 369, 370 n.1 (1961).*

### PRACTICE COMMENTARY

See also Instructions No. 2.210, Effect of Judge Striking Defense; 9.000, General Personal Injury and Property Damage; and 9.010, Reasonable Proof.

☞ ***PRACTICE POINTER*:** Remember that there is a difference between admitting fault or negligence and admitting liability, which is negligence plus causation. This instruction may be modified if only fault or negligence is admitted.

### *ALERTS:*

None.

## Instruction No. 2.210
## Effect of Judge Striking Defense

**The court has found that defendant is liable for any injury the plaintiff received from the accident. Therefore, the only issue you have to decide is the amount of damages the plaintiff is entitled to recover [if any].**

**The fact that the Court is submitting only the question of damages to you, and not the question of legal liability, should not influence you in any way in considering the issue of damages.**

[The court has found that the defendant was negligent and that the defendant's negligence was the proximate cause of the accident, and that the defendant is liable for any injury the plaintiff received from the accident. Therefore, the only issues you have to decide are whether the plaintiff was injured as a result of the accident and, if so, the amount of damages the plaintiff is entitled to recover, [if any].

The fact that the Court is submitting only the questions of injury and damages to you, and not the questions of legal liability, negligence, or causation, should not influence you in any way in considering the issues of injury and damages.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

**PRACTICE COMMENTARY**

See also Instructions No. 2.200, Effect of Defendant Admitting Liability; 9.000, General Personal Injury and Property Damage; and 9.010, Reasonable Proof.

***ALERTS:***

None.

## Instruction No. 2.220
## Verdict Not to Be Based on Sympathy, Bias, Guesswork, or Speculation

**You must not base your verdict in any way upon sympathy, bias, guesswork, or speculation. Your verdict must be based solely upon the evidence and instructions of the court.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Houser, 213 Va. 617, 619, 194 S.E.2d 754, 755 (1973)*; *Bangley v. Virginian Ry. Co., 195 Va. 340, 348–49, 78 S.E.2d 696, 701 (1953)*; *Harless v. Atlantic Life Ins. Co., 186 Va. 826, 838, 44 S.E.2d 430, 436 (1947).*

### PRACTICE COMMENTARY

This instruction is routinely requested and often given despite the fact that it is not much more than a reiteration of concepts mentioned in other instructions. But it is not error to refuse to give this instruction, unless sympathy and bias have become more than unspoken undercurrents at the trial. *Barnes v. Commonwealth, 190 Va. 732, 737, 739–40, 58 S.E.2d 12, 14, 16 (1950)*; *Norfolk S. Ry. Co. v. Wood, 182 Va. 30, 36–37, 28 S.E.2d 15, 18 (1943).*

### *ALERTS:*

None.

## Instruction No. 2.240
## Verdict Against an Estate: Dead Man's Act

**You cannot render a verdict against** (name of individual or entity protected by the statute) **based upon the uncorroborated testimony of** (name(s) of adverse and interested party or parties)**.**

**Corroborating evidence is evidence that tends to confirm and strengthen or to show the truth or probability of the testimony of the witness who must be corroborated. Such evidence need not come from a witness; it may be furnished by physical facts or from other circumstances adequately proven.**

**If you find that some or all of the testimony of** (name(s) of adverse and interested party or parties) **was uncorroborated, you must disregard the uncorroborated testimony.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-397; Va. Evid. R. 2:804(b)(5).

**Principal Case Authority:** *Shumate v. Mitchell, 296 Va. 532, 540–49, 822 S.E.2d 9, 12–17 (2018)*; *Taylor v. Mobil Corp., 248 Va. 101, 110, 444 S.E.2d 705, 710 (1994)*; *Whitmer v. Marcum, 214 Va. 64, 65–69, 196 S.E.2d 907, 908–10 (1973)*.

**Other Relevant Decisions:** *Keith v. Lulofs, 283 Va. 768, 775–76, 724 S.E.2d 695, 699 (2012)*; *Virginia Home for Boys & Girls v. Phillips, 279 Va. 279, 286, 688 S.E.2d 284, 287–88 (2010)*; *Johnson v. Raviotta, 264 Va. 27, 32, 563 S.E.2d 727, 731 (2002)*; *Rice v. Charles, 260 Va. 157, 165–66, 532 S.E.2d 318, 322–23 (2000)*; *Diehl v. Butts, 255 Va. 482, 489, 499 S.E.2d 833, 837–38 (1998)*; *Cooper v. Cooper, 249 Va. 511, 516, 457 S.E.2d 88, 91 (1995)*; *Adams v. Adams, 233 Va. 422, 427–28, 357 S.E.2d 491, 494 (1987)*; *Brooks v. Worthington, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965)*.

## Practice Commentary

Before the jury may consider testimony that requires corroboration, the court must determine whether there is more than a scintilla of corroborative evidence. Often, this cannot be done until the parties have presented all of their evidence. If, after the close of evidence, the court determines that an adverse or interested party's testimony is not corroborated by more than a scintilla of evidence, the court should—as a matter of law—instruct the jury to disregard that testimony. If, however, the court finds as a matter of law that the testimony is corroborated by more than a scintilla of evidence, the jury must resolve the factual issue of whether that evidence sufficiently corroborated the testimony. *Johnson, 264 Va. at 33, 39, 563 S.E.2d at 731–32, 735*; *Taylor, 248 Va. at 110–11, 444 S.E.2d at 710–11*.

"Adverse" parties are parties of record; "interested" parties are not. *Merchs. Supply Co. v. Hughes, 139 Va. 212, 216, 123 S.E. 355, 356 (1924)*. A party's interest can arise from a number of circumstances, but a pecuniary interest that conflicts with the interest of the party protected by the statute is sufficient. *Ratliff v. Jewell, 153 Va. 315, 324–25, 149 S.E. 409, 411 (1929)*.

The statute requires corroboration when a party is incapable of testifying for "any cause." John Doe, an uninsured motorist, does not qualify as a party incapable of testifying. *Doe v. Faulkner, 203 Va. 522, 524–25, 125 S.E.2d 169, 170–71 (1962)*; *Johnson, 264 Va. at 33, 39, 563 S.E.2d at 731–32, 735*.

☞ ***Practice Pointer:*** A higher degree of corroboration is required in a case involving parties between whom a confidential relationship existed. *Vaughn v. Shank, 248 Va. 224, 229, 445 S.E.2d 127, 130 (1994)*.

## *Alerts:*

- When a defendant makes a motion to strike at the conclusion of the plaintiff's case based upon the plaintiff's failure to comply with Va. Code Ann. § 8.01-397, but the judge takes the motion under advisement or delays ruling on the motion, the

judge must consider all the evidence that has been admitted prior to ruling on the motion. *Williams v. Condit, 265 Va. 49, 52, 574 S.E.2d 241, 243 (2003).*

- In *Whitmer*, it was held that an objection to an instruction featuring language similar to that used in the model instruction but omitting the language indicating that corroborating evidence need not come from a witness and that it could be furnished by physical facts or from other circumstances adequately proven was "not without merit," insofar as it was based on the premise that the instruction as given "was not sufficiently clear and comprehensive to instruct the jurors on the principles involved." *214 Va. at 65–69, 196 S.E.2d at 908–10.*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 40.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-8, 10-7, 12-11, 15-16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 13.7

MICHIE'S JURISPRUDENCE, Witnesses §§ 15, 17, 18, 22

## Instruction No. 2.250
## Unanimous Verdict: "*Allen* ["*Titcomb*"] Charge"

**As you have been told, your verdict must be unanimous. If you can possibly reach a verdict, it is your duty to do so. You should listen to the views and opinions of your fellow jurors with fairness and candor, and you should give consideration to what they say. However, you must decide the case for yourself, and you should reach an agreement only if it can be done without sacrificing your individual judgment. During the course of your deliberations, each of you, whether in the majority or the minority, should not hesitate to re-examine your own views and change your opinion if you are convinced it was wrong. None of you, as a juror, however, should give up your honest opinion as to the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.**

**If you can reach a decision without surrendering your conscientious opinion, it is your duty to do so.**

**Please return to the jury room and give the matter your further consideration.**

[What I am about to say does not mean that you are going to be made to agree or that you are going to continue deliberations until you arrive at a verdict.

Trials are expensive and the jury must decide the issues in the case. If you cannot decide, then we will have to get another jury to decide the issues. I see no reason why you as jurors are not as competent and able to decide the issues as any other jury.

It is your duty to make an honest and sincere attempt to reach a verdict. Of course, that must be unanimous. Jurors should be open-minded and listen to the argument of others.

Talk over the issues and evidence freely and fairly. Each juror must decide the issue for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors.

In the course of deliberations a juror should not hesitate to re-examine his or her views and change his or her opinion if convinced it is erroneous.

Each juror in the minority view should reconsider such minority view in light of the opinion of the majority. And, likewise, each juror in the majority view should give equal consideration to the views of the minority.

No juror should surrender his or her conviction as to the weight of the evidence, solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

As fair-minded individuals, then, I am asking you to go back, to retire, to make another honest effort to come to a conclusion on all the issues presented in the case, keeping in mind what I said to you in this instruction.]

**Thank you.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**PRINCIPAL CASE AUTHORITY:** *Titcomb v. Wyant, 1 Va. App. 31, 36, 41, 333 S.E.2d 82, 85, 87–88 (1985)*; *Petcosky v. Bowman, 197 Va. 240, 252–53, 89 S.E.2d 4, 13 (1955)*; *Allen v. United States, 164 U.S. 492, 501–02 (1896).*

**OTHER RELEVANT DECISIONS:** *Joseph v. Commonwealth, 249 Va. 78, 87, 452 S.E.2d 862, 868 (1995)*; *Tuggle v. Commonwealth, 228 Va. 493, 508–09, 323 S.E.2d 539, 548 (1984)*; *Poindexter v. Commonwealth, 213 Va. 212, 214–15, 191 S.E.2d 200, 202–03 (1972).*

### PRACTICE COMMENTARY

The alternative bracketed instruction is taken verbatim from the instruction approved in *Titcomb, 1 Va. App. at 36, 41, 333 S.E.2d at 85, 87–88.*

It is not error to refuse an *Allen* instruction where the jurors had not indicated they were in disagreement. *Joseph, 249 Va. at 87, 452 S.E.2d at 868.*

### *ALERTS:*

- The Supreme Court of Virginia has stated that an instruction that jurors are "not required to surrender their convictions merely to render a verdict . . . is an invitation for jurors to disagree." *Tuggle, 228 Va. at 508–09, 323 S.E.2d at 548.*

# Chapter 3

# ISSUES, BURDEN OF PROOF AND FINDING INSTRUCTIONS

## Scope Note


**Instruction No. 3.000** **Negligence: Issues and Allocation of Burdens of Proof**

**Instruction No. 3.050** **Finding Instruction**

**Instruction No. 3.060** **Finding Instruction: Multiple Defendants**

**Instruction No. 3.100** **Standard of Proof: Definition of Greater Weight of the Evidence**

**Instruction No. 3.110** **Standard of Proof: Definition of Clear and Convincing Evidence**

# SCOPE NOTE

The instructions in this chapter form the core of all the other instructions in the book. Every case contains at least one issue, and most contain more. Although written for a negligence case, Instruction No. 3.000 can be adapted to spell out the issues and allocate the burden of proof on every issue in one instruction, no matter the case. The jury must be given a finding instruction in every case; Instruction Nos. 3.050 and 3.060 are written for a negligence case, but like No. 3.000, can be adapted to any case. It is designed so that only one finding instruction is needed in any case.

Instruction Nos. 3.100 and 3.110 define the two civil standards of proof: the greater weight of the evidence and clear and convincing evidence.

In other chapters, one or more of the first three instructions in this chapter have been adapted to cover situations other than simple negligence. These instructions can serve as additional guides for drafting issue, burden-of-proof, and finding instructions. See, e.g., Chapters 21, Railroads—FELA; 28, Bailments; 36, Assault and Battery; 37, Defamation; 38, False Imprisonment; 39, Fraud; 40, Miscellaneous Intentional Torts; and 41, Malicious Prosecution.

Chapter 1, How To Use This Book, contains a section in which the use of the instructions in this chapter is demonstrated by a set of instructions for a hypothetical case.

**Instruction No. 3.000**
**Negligence: Issues and Allocation of Burdens of Proof**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

**(1) Was the defendant negligent?**

**(2) If the defendant was negligent, was his negligence a proximate cause of the accident?**

**On these issues the plaintiff has the burden of proof.**

**(3) Was the plaintiff negligent?**

**(4) If he was negligent, was the plaintiff's negligence a proximate cause of the accident?**

**On these issues the defendant has the burden of proof.**

**(5) If the plaintiff is entitled to recover, what is the amount of the plaintiff's damages?**

**On this issue the plaintiff has the burden of proof.**

**Your decision on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** None.

**Practice Commentary**

An issue instruction is important. It is the judicial counterpart of the lawyers' opening statements, and it serves the same function: it tells the jury what the judge is going to tell them. Although most judges will have told the jury—in general terms—what the case is about, this instruction sets out the precise issues the jury will have to decide. In addition, it states the issues in legal terms defined in other instructions.

This issue instruction does not tell the jury that it will necessarily have to decide all of these issues; it only tells them what the issues are. Whenever sufficient evidence on an issue is presented, the jury must be instructed on the issue. This is true even if, under the court's other instructions, the jury does not have to reach the issue. An obvious example is contributory negligence. Whenever the evidence presents a jury issue on contributory negligence, a party is entitled to an instruction embodying this issue. *Commonwealth v. Coolidge, 237 Va. 621, 625, 379 S.E.2d 338, 341 (1989).*

It is important to coordinate the issues and allocation of burden of proof instruction with the finding instruction in each case. Instruction No. 3.050 is a model finding instruction in a single defendant case; or Instruction No. 3.060 is a model for multiple-defendant cases. The burden of proof must be assigned to one or the other party, and the standard of proof—by the greater weight of the evidence or by clear and convincing evidence—must be stated. This instruction allocates the burden of proof between the parties; it does not define the standard by which the burden is met. In any case that involves only a single standard of proof, there should be no confusion if the standard-of-proof instruction is given separately rather than included with the issues and allocation of burden-of-proof instruction. If more than one standard of proof is involved, this instruction should be altered to state the standard and burden of proof for each issue. The finding instruction must account for every issue, and it must always include the standards and burdens of proof. Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence, will generally be given with this instruction, but in some cases Instruction No. 3.110, defining clear and convincing evidence, will be required.

The format of this instruction is adaptable to any lawsuit imaginable. For examples of issues and allocation of burden of proof instructions, see the following: Nos. 28.070 and 28.071, Bailments; Nos. 36.050 and 36.060, Assault and Battery; and Nos. 38.060 and 38.070, False Imprisonment. For examples of finding instructions, see the following: No. 21.050, F.E.L.A.; Nos. 28.080 and 28.081, Bailments; Nos. 36.070 and 36.080, Assault and Battery; Nos. 38.080 and 38.090, False Imprisonment; Nos. 39.090, 39.100 and 39.110, Fraud; and No. 41.130, Malicious Prosecution.

The Scope Note to this chapter and the discussion on sample instructions in Chapter 1, How To Use This Book, provide additional guidance.

***ALERTS:***

- This is a model issue instruction designed for a negligence case where negligence, contributory negligence, and proximate cause are all jury issues. If the parties stipulate to any of these issues, or if the judge gives a peremptory instruction on any of these issues, you will have to modify this instruction appropriately.

- If assumption of the risk or some other defense or doctrine is involved in the case instead of or in addition to contributory negligence, you will have to make the appropriate addition or substitution. For example, if a case also involves assumption of the risk, add the following sentence and renumber accordingly immediately after subparagraph (4): "Did the plaintiff assume the consequences of a known risk?"

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

**Instruction No. 3.050**
**Finding Instruction**

**You shall find your verdict for the plaintiff if the plaintiff has proved by the greater weight of the evidence that:**

**(1) the defendant was negligent; and that**

**(2) the defendant's negligence was a proximate cause of the plaintiff's accident and damages.**

**You shall find your verdict for the defendant if:**

**(1) the plaintiff failed to prove either or both of the two elements above; or if**

**(2) you find by the greater weight of the evidence that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of the accident.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

There should be only one finding instruction in each case. Every negligence instruction in these volumes states what the legal duty is and concludes with a paragraph explaining that a violation of that duty is negligence. If only the negligence instructions appropriate to the case—that is, those that are supported by the evidence—are selected, and if each is adapted to fit the particular facts of the case, then the jury will be fully instructed with only one finding instruction.

☞***PRACTICE POINTER*:** If there is no issue of contributory negligence, the second subparagraph (2) should be omitted.

### *ALERTS:*

- This instruction must be adapted to fit the facts of the case. It must be coordinated with Instruction No. 3.000. See the Practice Commentary for that instruction.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

**Instruction No. 3.060**
**Finding Instruction: Multiple Defendants**

**You shall find your verdict for the plaintiff and against** (name of first defendant) **if the plaintiff has proved by the greater weight of the evidence that:**

**(1)** (name of first defendant) **was negligent; and that**

**(2)** (name of first defendant)**'s negligence was a proximate cause of the plaintiff's accident and damages.**

**You shall find your verdict for the plaintiff and against** (name of second defendant) **if the plaintiff has proved by the greater weight of the evidence that:**

**(1)** (name of second defendant) **was negligent; and that**

**(2)** (name of second defendant)**'s negligence was a proximate cause of the plaintiff's accident and damages.**

**You shall find your verdict for the plaintiff and against both defendants if the plaintiff has proved by the greater weight of the evidence that:**

**(1) both defendants were negligent; and that**

**(2) the negligence of both defendants was a proximate cause of the plaintiff's accident and damages.**

**You shall find your verdict for either or both defendants if:**

**(1) as to that defendant, the plaintiff has failed to prove either negligence or proximate cause; or**

**(2) you find by the greater weight of the evidence that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of the accident.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

In some multiple defendant cases, either Instruction No. 4.020, Concurring Negligence, or Instruction No. 4.025, Single, Indivisible Injury, might be applicable.

### *ALERTS:*

- This instruction must be adapted to fit the facts of the case. It must be coordinated with Instruction No. 3.000. See the Practice Commentary for that instruction.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

## Instruction No. 3.100
## Standard of Proof: Definition of Greater Weight of the Evidence

**The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all of the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sawyer v. Comerci, 264 Va. 68, 75, 563 S.E.2d 748, 752 (2002)*; *Northern Virginia Power Co. v. Bailey, 194 Va. 464, 471, 73 S.E.2d 425, 429 (1952)*; *Matthews v. LaPrade, 144 Va. 795, 801, 130 S.E. 788, 789 (1925)*; *Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va. 137, 156–58, 104 S.E. 371, 377–78 (1920).*

### PRACTICE COMMENTARY

None.

☞ ***PRACTICE POINTER:*** The Supreme Court of Virginia has explained that "it is the quality, not the quantity, of the evidence which determines whether a particular standard of proof is met." *Gulfstream Bldg. Assoc., Inc. v. Britt, 239 Va. 178, 184, 387 S.E.2d 488, 491 (1990)* (rejecting appellee's argument that "the record [wa]s so 'sparse' that it could not meet the required clear and convincing standard of proof").

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

## Instruction No. 3.110
## Standard of Proof: Definition of Clear and Convincing Evidence

**When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Judicial Inquiry & Review Comm'n v. Waymack, 284 Va. 527, 534–35, 745 S.E.2d 410, 414 (2012)*; *Judicial Inquiry and Review Comm'n v. Lewis, 264 Va. 401, 405, 568 S.E.2d 687, 689 (2002)*; *Ashmore v. Herbie Morewitz, Inc., 252 Va. 141, 147, 475 S.E.2d 271, 275 (1996)*; *Bottoms v. Bottoms, 249 Va. 410, 413, 457 S.E.2d 102, 104 (1995)*; *Southeastern Tidewater Opportunity Project, Inc. v. Bade, 246 Va. 273, 276–77, 435 S.E.2d 131, 133 (1993)*; *Higgins v. Bowdoin, 238 Va. 134, 142, 380 S.E.2d 904, 909 (1989)*; *Oberbroeckling v. Lyle, 234 Va. 373, 379, 362 S.E.2d 682, 685 (1987)*; *Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 540–41, 211 S.E.2d 88, 92 (1975)*.

### PRACTICE COMMENTARY

In *Fred C. Walker Agency, Inc. v. Lucas*, the Supreme Court defined the familiar phrase "clear and convincing evidence" as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *215 Va. at 541, 211 S.E.2d at 92.*

☞ ***PRACTICE POINTER:*** No reference is made in this instruction to clear and convincing evidence being an intermediate standard of proof. To tell the jury that this standard is in between the greater weight of the evidence and beyond a reasonable doubt standard would require defining those standards for the jury, thereby confusing the applicable standard rather than clarifying it.

☞ ***PRACTICE POINTER:*** The Supreme Court of Virginia has explained that "it is the quality, not the quantity, of the evidence which determines whether a particular standard of proof is met." *Gulfstream Bldg. Assoc., Inc. v. Britt, 239 Va. 178, 184, 387 S.E.2d 488, 491 (1990)* (rejecting appellee's argument that "the record [wa]s so 'sparse' that it could not meet the required clear and convincing standard of proof").

### *ALERTS:*

- This standard of proof is inapplicable to the majority of damages issues. The applicable standard rather is "the greater weight of the evidence" as is set forth in Instruction No. 3.100. See, e.g., Instruction Nos. 9.000, General Personal Injury and Property Damage, 9.080, General Punitive Damages, 9.100, Damages: Death by Wrongful Act and 9.105, Punitive Damages: Death by Wrongful Act.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

# Chapter 4

# NEGLIGENCE

## Scope Note


**Instruction No. 4.000** **Definition of Negligence**

**Instruction No. 4.010** **Burden of Proof**

**Instruction No. 4.015** **Fact of Accident Is Not Proof of Negligence**

**Instruction No. 4.018** **Foreseeable Consequences**

**Instruction No. 4.020** **Concurring Negligence**

**Instruction No. 4.025** **Single, Indivisible Injury**

**Instruction No. 4.030** **Definition of Gross Negligence**

**Instruction No. 4.040** **Definition of Willful and Wanton Conduct**

# SCOPE NOTE

This chapter contains instructions defining negligence, concurring negligence, gross negligence and willful and wanton conduct, and other instructions related to negligence and causation. Proximate cause and superseding cause are addressed in Chapter 5, Causation. The defenses of contributory negligence and assumption of risk are covered in Chapter 6, Contributory Negligence and Assumption of the Risk. Special negligence doctrines of sudden emergency, medical emergency, negligent entrustment, rescue, last clear chance, and *res ipsa loquitur* are discussed in Chapter 7.

Instruction No. 4.000 defines negligence. Instruction No. 4.020 defines concurring negligence, while Instruction No. 4.025 deals with a single, indivisible injury caused by two or more tortfeasors.

Instruction No. 4.010 establishes the burden of proof in a negligence case. Instruction No. 4.015 clarifies that the mere happening of an accident does not, of itself, entitle an injured plaintiff to recover.

The Supreme Court has held that it is error to give an unavoidable accident instruction because it merely restates the law of negligence and is misleading and confusing. *Hancock-Underwood v. Knight, 277 Va. 127, 136, 670 S.E.2d 720, 725 (2009).*

Gross negligence is defined in Instruction No. 4.030. Willful and wanton conduct is defined in Instruction No. 4.040. For an explanation of the distinction between gross negligence versus willful and wanton conduct and reckless conduct, see the Alerts to Instruction No. 4.030.

See Chapter 6 regarding the negligence and contributory negligence of children.

**Negligence, Negligence per se, and Negligence as a Matter of Law**

There are three types of negligence actions: negligence, negligence per se, and negligence as a matter of law. Negligence is the failure to use ordinary care in some duty owed to another. *Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 212–13 (1984).* To prove negligence, it is necessary to prove an act done in the absence of ordinary care that violates a duty owed to another. For example, a driver has a duty to use ordinary care to keep his vehicle under control. To prove negligence, the plaintiff must prove that the defendant did not use ordinary care to avoid losing control, and that he or she lost control. In contrast, negligence per se is a doctrine whereby an act is considered negligent because it violates a statute or regulation. *Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011).* A person relying on negligence per se is not required to establish common law negligence. *Evans v. Evans, 280 Va. 76, 84, 695 S.E.2d 173, 177 (2010).* Negligence per se is established by proof of an act itself; the presence or absence of ordinary care is irrelevant. For example, there is a statutory duty not to exceed the speed limit; proof that someone exceeded the speed limit is proof of negligence. It is not necessary to prove that the excess speed was the result of a failure to use ordinary care. The third concept, negligence as a matter of law, simply means that the proof, whether of negligence or negligence per se is either uncontradicted in fact or the contradictory proof is insufficient as a matter of law to create a jury issue on the existence of negligence.

"[A] negligence per se claim predicated on a statutory violation requires a showing that [i] the tortfeasor had a duty of care to the plaintiff, [ii] the standard of care for that duty was set by statute, [iii] the tortfeasor engaged in acts that violated the standard of care set out in the statute, [iv] the statute was enacted for public health and safety reasons, [v] the plaintiff was a member of the class protected by the statute, [vi] the injury was of the sort intended to be covered by the statute, and [vii] the violation of the statute was a proximate cause of the injury." *Parker v. Carilion Clinic, 296 Va. 319, 346, 819 S.E.2d 809, 825 (2018).*

Violating a safety statute is not always negligence per se. First, there may be instances when prudence and safety require such violation. Where circumstances make following the statute more dangerous than violating it, and where those circumstances are beyond the control of the party charged with the violation, the violation is excusable. *Morris v. Dame, 161 Va. 545, 566, 171 S.E. 662, 669 (1933).*

Second, where the party injured is not of the class which the statute was designed to protect, the violation is not negligence per se. *Id.* at 567–68. Thus, where vehicle one, with no taillights, collides head-on with vehicle two, the failure to equip vehicle one with taillights is not negligence per se to the driver of vehicle two. Although this may sound like a proximate cause issue, the Supreme Court has recognized it as a separate issue of negligence distinct from any question of causation. *Id.*

Third, the court may decide that some equipment statutes cannot reasonably be read to create an absolute duty to equip. For example, Va. Code Ann. §§ 46.2-1066, 46.2-1067, and 46.2-1068 deal with the requirement for and operation of brakes on vehicles. Despite the statutory duty to equip and despite proof that the brakes failed, when the defendant claims brake failure without forewarning, the court has consistently held that it is for the jury to determine whether the defendant's actions were negligent. *Simmons v. Adams, 202 Va. 926, 930–32, 121 S.E.2d 379, 382–84 (1961)*; *Rountree v. Rountree, 198 Va. 658, 662–63, 96 S.E.2d 113, 116 (1957).*

Finally, there is one instance where it would be at least confusing, and might be error, to instruct the jury that the failure to equip is negligence—where there is evidence that a vehicle was not properly equipped but a party does not wish to base its case on that technical statutory violation. For example, the plaintiff may want to rely on proof that the defendant crossed the center line rather than upon evidence that the defendant was driving with one headlight burned out. Where there is evidence of an equipment violation, but the plaintiff does not intend to argue that the violation caused the accident, the jury might be confused by an instruction stating that the failure to equip is negligence.

**Instruction No. 4.000**
**Definition of Negligence**

**Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Green v. Ingram, 269 Va. 281, 292, 608 S.E.2d 917, 923 (2005)*; *Perlin v. Chappell, 198 Va. 861, 864, 96 S.E.2d 805, 808 (1957)*; *Montgomery Ward & Co. v. Young, 195 Va. 671, 673, 79 S.E.2d 858, 859 (1954)*; *Moore v. Virginia Transit Co., 188 Va. 493, 498, 50 S.E.2d 268, 271 (1948).*

### PRACTICE COMMENTARY

In most cases, this instruction will be given with other, more specific, instructions on the standard of care in the particular case. The court has observed that "[a]n instruction should be based upon the evidence in the case rather than upon general principles of negligence." *Pullen v. Nickens, 226 Va. 342, 349, 310 S.E.2d 452, 456 (1983).*

☞ ***PRACTICE POINTER:*** The doctrine of negligence per se is the adoption of a legislative standard as the standard of conduct for a reasonable person. *Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011)*; *Butler v. Frieden, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967).* However, the legislature may provide that failure to meet the statutory standard shall not constitute negligence per se. See Winter Sports Safety Act, Va. Code Ann. § 8.01-227.22 (expressly providing that failure to abide by or fulfill a duty or responsibility under the Act shall not constitute negligence per se). A person relying on negligence per se is not required to establish common law negligence. *Evans v. Evans, 280 Va. 76, 84, 695 S.E.2d 173, 177 (2010).*

The issue of duty is "purely a question of law." To maintain a negligence cause of action, the plaintiff must show that the defendant had a legal duty to act. *Brown v. Jacobs, 289 Va. 209, 215, 768 S.E.2d 421, 424 (2015) Commonwealth v. Peterson, 286 Va. 349, 356, 749 S.E.2d 307, 311 (2013).* See also *Collett v. Cordovana, 290 Va. 139, 146, 772 S.E.2d 584, 588 (2015)*; *Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 132, 523 S.E.2d 826, 830 (2000).*

☞ ***PRACTICE POINTER:*** Negligence conveys the idea of heedlessness, inattention, or inadvertence. *Green, 269 Va. at 292, 608 S.E.2d at 923.* "Ordinary care" and "reasonable care" are interchangeable terms. *Perlin, 198 Va. at 864, 96 S.E.2d at 808.*

### ALERTS:

- In order for negligence to be actionable, the probable consequences must be foreseeable. A party need not have anticipated or foreseen the precise consequence, but foreseeability is shown if an ordinarily careful and prudent person ought, under the same or similar circumstances, to have anticipated that an injury might probably result from the negligent act. *Llewellyn v. White, 297 Va. 588, 596, 831 S.E.2d 494, 498 (2019)*; *Interim Personnel of Cent. Virginia, Inc. v. Messer, 263 Va. 435, 442, 559 S.E.2d 704, 708 (2002).* See Instruction No. 4.018.

- Issues of negligence and proximate causation ordinarily are questions of fact

for the jury's determination. A court decides these issues only when reasonable persons could not differ. *Dorman v. State Industries, Inc., 292 Va. 111, 122, 787 S.E.2d 132, 138 (2016); Rascher v. Friend, 279 Va. 370, 377, 689 S.E.2d 661, 666 (2010); Kellermann v. McDonough, 278 Va. 478, 493, 684 S.E.2d 786, 793 (2009).*

***RESEARCH REFERENCES:*:**

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

**Instruction No. 4.010**
**Burden of Proof**

**The plaintiff has the burden of proving by the greater weight of the evidence that the defendant was** [negligent; grossly negligent; willfully or wantonly negligent] **and that the defendant's negligence was a proximate cause of the accident and any of the injuries to the plaintiff.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Terry, 273 Va. 3, 8–9, 639 S.E.2d 197, 200 (2007)*; *B.G. Young & Sons, Inc. v. Kirk, 202 Va. 176, 182–83, 116 S.E.2d 38, 43 (1960).*

### PRACTICE COMMENTARY

Instruction No. 4.030 defines gross negligence. Instruction No. 4.040 defines willful and wanton negligence. Instruction No. 5.000 defines proximate cause.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

## Instruction No. 4.015
## Fact of Accident Is Not Proof of Negligence

**The fact that there was an accident and that the plaintiff was injured does not, of itself, entitle the plaintiff to recover.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lucas v. Riverhill Poultry, Inc., 860 S.E.2d 361, 370 (2021)*; *Doe v. Terry, 273 Va. 3, 9, 639 S.E.2d 197, 200 (2007)*; *Jordan v. Jordan, 220 Va. 160, 162, 257 S.E.2d 761, 762 (1979)*; *McFadden v. Garrett, 211 Va. 680, 683, 179 S.E.2d 482, 484–85 (1971)*; *Canupp v. Wade, 205 Va. 850, 854–55, 140 S.E.2d 659, 662 (1965)*; *Weddle v. Draper, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963)*; *Hailey v. Johnson, 201 Va. 775, 777, 113 S.E.2d 664, 666 (1960)*; *Worrell v. Winstead, 194 Va. 597, 599–600, 74 S.E.2d 62, 63–64 (1953)*; *Yeary v. Holbrook, 171 Va. 266, 283–84, 198 S.E. 441, 449 (1938)*.

### PRACTICE COMMENTARY

Where there is proof that the defendant violated a clear statutory mandate—for example, that he ran through a red light—this instruction is inappropriate. *Cook v. Basnight, 207 Va. 491, 495, 151 S.E.2d 408, 410–11 (1966)*. For an example of a case in which the plaintiff failed to make out a prima facie case, see *Lawson v. John Doe, 239 Va. 477, 391 S.E.2d 333 (1990)* (verdict for plaintiff set aside because of failure to show with probable certainty that son was killed by negligence of John Doe in carrying wood extending more than 6 inches beyond line of fender).

For an analogous instruction specific to medical malpractice cases, see Instruction No. 35.040.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, *Negligence* §§ 1 through 69

## Instruction No. 4.018
## Foreseeable Consequences

**The defendant is not required to have anticipated or foreseen the precise** [injury; damage] **that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some** [injury; damage] **might probably result from the negligent act.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Interim Personnel of Cent. Virginia, Inc. v. Messer, 263 Va. 435, 442, 559 S.E.2d 704, 708 (2002)*; *Blondel v. Hays, 241 Va. 467, 475, 403 S.E.2d 340, 345 (1991)*; *Norfolk Shipbuilding & Drydock v. Scovel, 240 Va. 472, 476, 397 S.E.2d 884, 886 (1990).*

### PRACTICE COMMENTARY

This instruction should only be used when there is an issue whether it is foreseeable that the defendant's conduct could cause some injury or damage.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

## Instruction No. 4.020
## Concurring Negligence

**If two or more persons are negligent, and if the negligence of each is a proximate cause of the plaintiff's injury, then each is liable to the plaintiff for his injury. This is true even if the negligence of one is greater than the negligence of the** [other; others]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Ford Motor Co. v. Boomer, 285 Va. 141, 151, 736 S.E.2d 724, 728 (2013)*; *Sullivan v. Robertson Drug Co., 273 Va. 84, 92, 639 S.E.2d 250, 255 (2007)*; *Maroulis v. Elliott, 207 Va. 503, 510, 151 S.E.2d 339, 344 (1966)*; *Von Roy v. Whitescarver, 197 Va. 384, 393, 89 S.E.2d 346, 352 (1955).*

### PRACTICE COMMENTARY

When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action. *Baise v. Warren, 158 Va. 505, 511, 164 S.E. 655, 657 (1932); Walton, Witten & Graham v. Miller, 109 Va. 210, 214, 63 S.E. 458, 460 (1909).*

Where two causes of action concur to bring about an event, the plaintiff must show that the defendant's conduct or product alone was sufficient to bring about an identical result. *Boomer, 285 Va. at 156, 736 S.E.2d at 731*; *Wells v. Whitaker, 207 Va. 616, 623–24, 151 S.E.2d 422, 429 (1966).*

Where two defendants are negligent, one defendant cannot be exonerated by showing negligence on the part of the other. *Von Roy, 197 Va. at 393, 89 S.E.2d 352; Richmond Coca-Cola Bottling Works v. Andrews, 173 Va. 240, 251, 3 S.E.2d 419, 423 (1939).*

☞ ***PRACTICE POINTER:*** It is not necessary that the concurring acts of negligence occur simultaneously. *Dickenson v. Tabb, 208 Va. 184, 193, 156 S.E.2d 795, 802 (1967).*

### ***ALERTS:***

- In *Ford Motor Co. v. Boomer, 285 Va. 141, 736 S.E.2d 724 (2013)*, the Supreme Court of Virginia, for the first time, was called upon to "rule explicitly as to the causation standard appropriate for mesothelioma." The Court held that "in concurring causation cases, the 'sufficient'-to-have-caused standard . . . is the proper way to define the cause-in-fact element of proximate cause." The Court further held that "use of the multiple-sufficient-causes approach remains appropriate whether the concurring causes are all tortious in nature or whether some are innocent." *Id. at 158, 736 S.E.2d at 732.*

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

## Instruction No. 4.025
## Single, Indivisible Injury

**If separate and independent acts of negligence of two [or more] [persons; defendants] are each a proximate cause of a single indivisible injury to the plaintiff, and if it is not possible to determine what portion of the injury was caused by each negligent [person; defendant], then each is liable to the plaintiff for the injury.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sullivan v. Robertson Drug Co., 273 Va. 84, 92, 639 S.E.2d 250, 255 (2007)*; *Dickenson v. Tabb, 208 Va. 184, 192, 156 S.E.2d 795, 801 (1967)*; *Murray v. Smithson, 187 Va. 759, 764, 48 S.E.2d 239, 241 (1948)*; *Richmond Coca-Cola Bottling Works v. Andrews, 173 Va. 240, 251, 3 S.E.2d 419, 423 (1939)*; *Yonker v. Williams, 169 Va. 294, 299, 192 S.E. 753, 755 (1937)*; *Baise v. Warren, 158 Va. 505, 511, 164 S.E. 655, 657 (1932).*

### PRACTICE COMMENTARY

Where two defendants are negligent, one defendant cannot be exonerated by a showing of negligence on the part of the other. *Von Roy v. Whitescarver, 197 Va. 384, 393, 89 S.E.2d 346, 352 (1955)*; *Richmond Coca-Cola Bottling Works, 173 Va. at 251, 3 S.E.2d at 423.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

## Instruction No. 4.030
## Definition of Gross Negligence

**"Gross negligence" is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of** [another person; another person's property]**. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Doe v. Baker, 299 Va. 628, 652, 857 S.E.2d 573, 587 (2021)*; *Elliott v. Carter, 292 Va. 618, 622, 791 S.E.2d 730, 732 (2016)*; *Green v. Ingram, 269 Va. 281, 290–91, 608 S.E.2d 917, 922 (2005)*; *Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971)*; *Thomas v. Snow, 162 Va. 654, 660–61, 174 S.E. 837, 839 (1934).*

## Practice Commentary

This instruction is essentially the instruction specifically approved in *Ferguson, 212 Va. at 92, 181 S.E.2d 653* and in *Green, 269 Va. at 290–91, 608 S.E.2d at 922.*

The Court recognizes three levels of negligence: simple negligence, gross negligence and willful and wanton negligence. *Doe, 299 Va. at 652, 857 S.E.2d at 587*; *Infant C., 239 Va. at 582, 391 S.E.2d at 327*; *Cowan, 268 Va. at 486–87, 603 S.E.2d at 918.* The difference between simple negligence and gross negligence is one of degree. The difference between any form of negligence and causes of action for willful and wanton conduct, reckless conduct or intentional misconduct is a matter of kind. *Green, 269 Va. at 292, 608 S.E.2d at 923.*

Deliberate conduct is important evidence on the question of gross negligence. *City of Lynchburg, 270 Va. at 170, 613 S.E.2d at 410.*

Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. *Chapman, 252 Va. at 190, 475 S.E.2d at 801*; *Kennedy v. McElroy, 195 Va. 1078, 1082, 81 S.E.2d 436, 439 (1954).*

Whether certain actions constitute gross negligence is generally a factual matter for resolution by the jury and becomes a question of law only when reasonable people cannot differ. *Koffman, 265 Va. at 15, 574 S.E.2d at 260; Griffin v. Shively, 227 Va. 317, 320, 315 S.E.2d 210, 212 (1984).*

Where the facts of a case could possibly lead a jury to conclude that a defendant acted in "utter disregard of prudence amounting to a complete neglect of the plaintiff's safety," a jury instruction on gross negligence should be given. *Burns, 283 Va. at 677–78, 727 S.E.2d at 647*; *Koffman, 265 Va. at 15, 574 S.E.2d at 260 (2003).*

Because the standard for gross negligence in Virginia is one of indifference, not inadequacy, a claim for gross negligence fails as a matter of law when the evidence shows that the defendants exercised some degree of care. *Elliott, 292 Va. at 622, 791 S.E.2d at 732 (2016).*

To be actionable, more than simple negligence is required in cases involving:

Municipal recreation facilities—*Chapman, 252 Va. at 189, 475 S.E.2d at 800*; *Town of Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945)*; *Frazier, 234 Va. at 391, 362 S.E.2d at 690*; and *City of Lynchburg, 270 Va. at 167, 613 S.E.2d at 408.*

Police officer discharging official duties—*Meagher, 239 Va. at 383–84, 389 S.E.2d at 311–12* and *Colby v. Boyden, 241 Va. 125, 130, 400 S.E.2d 184, 187 (1991).*

Gratuitous bailment—*Dawson v. Fusco's Auto Serv., 178 Va. 350, 353, 17 S.E.2d 364, 365 (1941)* and *Morris, 225 Va. at 375, 302 S.E.2d at 53.* See Instruction No. 28.030, Bailee's Duty in Gratuitous Bailment.

Charitable organizations—*Cowan, 268 Va. at 488, 603 S.E.2d at 919.*

Va. Code Ann. § 3.2-5144—food storage facility owners donating food or farmers giving away crops.

Va. Code Ann. § 5.1-173—torts committed by Metropolitan Washington Airport Authority. The owner is immune, but its employees can be held liable for gross negligence. *Couplin v. Payne, 270 Va. 129, 136, 613 S.E.2d 592, 595–96 (2005).*

Va. Code Ann. § 8.01-44.2—actions against physicians for vaccine related deaths.

Va. Code Ann. § 8.01-220.1:2—damages resulting from care, supervision, or discipline of a student by a school board employed teacher.

Va. Code Ann. § 8.01-225—persons rendering emergency care.

Va. Code Ann. §§ 8.01-225.01, 8.01-225.02—health care providers during disasters in delivering health care to injured persons.

Va. Code Ann. § 8.01-225.1—licensed team physicians at school sporting event.

Va. Code Ann. § 8.01-225.2—persons rendering emergency care without compensation to animal at scene of emergency or accident.

Va. Code Ann. § 8.01-225.03—certain hospices, home care organizations, private providers, assisted living facilities, and adult day care centers rendering care for a patient with COVID-19 during a public health emergency. This immunity is time limited. For the effective dates of this provision see Va. Code Ann. § 8.01-225.03.

Va. Code Ann. § 8.01-226.2—licensed professional engineers and architects participating in relief or rescue efforts.

Va. Code Ann. § 8.01-226.3—officers, directors, and members of crime information gathering organization.

Va. Code Ann. § 8.01-226.4—hospice volunteers rendering care to terminally ill patients.

Va. Code Ann. § 8.01-226.5—installers and inspectors of child restraint devices.

Va. Code Ann. § 8.01-226.5:1—school board employees supervising self-administered medication pursuant to Va. Code Ann. § 22.1-274.2.

Va. Code Ann. § 8.01-226.5:2—hospital or rescue squad personnel for the acceptance of certain infants.

Va. Code Ann. § 8.01-226.7—owner or agent's compliance with lead-based paint information and maintenance.

Va. Code Ann. § 8.01-226.8—public officials and private volunteers participating in roadway litter pick up program for probationer.

Va. Code Ann. § 9.1-154—acts of employees or volunteers in a court-appointed special advocate program.

Va. Code Ann. § 15.2-1405—members of local governing bodies and agencies' exercise or failure to exercise discretionary or governmental authority which does not involve the unauthorized appropriation or misappropriation of funds.

Va. Code Ann. § 15.2-1809—injuries resulting from the maintenance or operation of a city or town park, recreational facility, or playground.

Va. Code Ann. § 15.2-1809.1—injuries resulting from the use of a locality's trails or waterways.

Va. Code Ann. § 22.1-258—volunteers notifying parents of truant school children.

Va. Code Ann. § 22.1-266—officers picking up truant school children.

Va. Code Ann. § 22.1-296.3—administrative or private organizations transferring school applicant's criminal records.

Va. Code Ann. § 29.1-509—landowner liability to those visiting public lands.

Va. Code Ann. § 32.1-27.1—injuries or property damage due to conditions at a nursing home or certified nursing facility attributed to an appointed receiver.

Va. Code Ann. § 32.1-36.1—any person making an unauthorized disclosure of a confidential HIV test.

Va. Code Ann. § 32.1-116.2—emergency facilities keeping patient records confidential.

Va. Code Ann. § 32.1-122.10:005—health care volunteer's services.

Va. Code Ann. § 32.1-126.01—nursing homes requiring criminal records from employment applicants.

Va. Code Ann. § 32.1-126.02—hospital pharmacy requiring criminal records from applicants.

Va. Code Ann. § 32.1-127.3—hospital employees, officers, or directors for rendering free services.

Va. Code Ann. § 32.1-162.9:1—licensed home care organization or hospice obtaining criminal records from employment applicants.

Va. Code Ann. § 32.1-163.1—a sanitarian approving or denying applications for permits for onsite sewage disposal systems or while performing checks of or reviewing and approving field evaluations completed by authorized onsite soil evaluators.

Va. Code Ann. § 32.1-283.2—members of teams, as well as their agents and employees, for participation in a child fatality review team or organization, institution, or person furnishing information, data, testimony, reports, or records to review teams.

Va. Code Ann. § 32.1-283.3—members of teams, as well as their agents and employees, for participation in a family violence fatality review or organization, institution, or person furnishing information, data, testimony, reports, or records to

review teams.

Va. Code Ann. § 37.2-416—background checks for employment in any direct consumer care position.

Va. Code Ann. § 37.2-506—background checks for employment in every operating community services board, administrative policy board, local government department with a policy-advisory board, behavioral health authority, and agency licensed pursuant to Chapter 8 (§ 37.1-179 et seq.) of this title that provides services under contract with a community services board, behavioral health authority or local government department in any direct consumer care position.

Va. Code Ann. § 44-146.23—individual, partnership, corporation, association, or other legal entity for acts taken voluntarily and without compensation in the course of rendering care, assistance, or advice with respect to an incident creating a danger to person, property, or the environment as a result of an actual or threatened discharge of a hazardous substance, or in preventing, cleaning up, treating, or disposing of or attempting to prevent, clean up, treat, or dispose of any such discharge, provided that such acts are taken under the direction of state or local authorities responding to the incident.

Va. Code Ann. § 44-146.28:1—officers or employees of a party state to the Emergency Management Assistance Compact rendering aid in another state.

Va. Code Ann. § 44-146.36—the Commonwealth, any political subdivision thereof, federal agencies, other public or private agencies, public or private employees, or representatives of any of them, engaged in any emergency services activities for the death of or injury to any person or damage to property during hazardous materials emergency response.

Va. Code Ann. § 45.1-161.292:49 and Va. Code Ann. § 45.1-161.76—any member of a state-designated mine rescue team engaging in rescue work at a mine for acts or omissions resulting from the rendering of such rescue work.

Va. Code Ann. § 46.2-342—Department of Motor Vehicles making or failure to make an Organ Donor notation on Driver's License.

Va. Code Ann. § 46.2-2099.42—operation of an excursion train by any city, county, or town.

Va. Code Ann. § 54.1-106—health care professionals rendering care at certain clinics.

Va. Code Ann. § 54.1-2524—Director and employees of the Department of Health Professions engaged in the reporting and compilation of health information.

Va. Code Ann. § 54.1-3811—Veterinary professionals rendering services without charge.

Va. Code Ann. § 56-484.18—damages resulting from the telecommunications company's designation of #77 for a State Police access number.

Va. Code Ann. § 62.1-44.34:18—no cap on liability imposed where person discharges oil into state waterways in a grossly negligent manner.

Va. Code Ann. § 63.2-1720—licensed assisted living facility, licensed adult day care center, licensed child-placing agency, or licensed independent foster home's failure to comply with criminal background check requirement.

Va. Code Ann. § 63.2-1902 and Va. Code Ann. § 63.2-1932—dissemination of information to the Department of Welfare and Social Services.

***ALERTS:***

• The use of the phrase "deliberate inattention" should be avoided in this instruction. *Terry v. Fagan, 209 Va. 642, 647, 166 S.E.2d 254, 257–58 (1969).*

• It is reversible error to instruct that the failure to exercise "slight care" is gross negligence. *Barham v. Virginia Nat'l Bank, 206 Va. 153, 157, 142 S.E.2d 569, 572 (1965).*

• It is reversible error to add to the instruction: "in other words, carelessness manifestly and materially greater than want of common prudence." *National Union Fire Ins. Co. v. Bruce, 208 Va. 595, 601, 159 S.E.2d 815, 820 (1968).*

• ***Willful recklessness and gross negligence distinguished.*** The Supreme Court of Virginia has explained that

> the difference between any form of negligence and causes of action for willful and wanton conduct, reckless conduct, or intentional misconduct is a matter of kind. Negligence conveys the idea of heedlessness, inattention, inadvertence; willfulness and wantonness convey the idea of purpose or design, actual or constructive. [In addition,] the difference between willful and wanton conduct and intentional misconduct [is that a]n actor guilty of intentional misconduct must intend to cause harm to another[, while a]n actor guilty of willful and wanton conduct intends his act, but not the resulting harm.

*Green v. Ingram, 269 Va. 281, 292, 608 S.E.2d 917, 923 (2005)*; *Infant C. v. Boy Scouts of America, Inc., 239 Va. 572, 582, 391 S.E.2d 322, 327 (1990)*; *Boward v. Leftwich, 197 Va. 227, 231, 89 S.E.2d 32, 35 (1955).* See also *Doe v. Baker, 299 Va. 628, 652, 857 S.E.2d 573, 587 (2021).* Citations to cases distinguishing willful negligence from wanton negligence may be found in the Practice Commentary and Alerts following Instruction No. 4.040.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

## Instruction No. 4.040
## Definition of Willful and Wanton Conduct

**"Willful and wanton conduct" is acting consciously in disregard of another person's rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and is also aware, from his knowledge of existing circumstances and conditions, that his conduct would probably result in injury to another.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Doe v. Baker, 299 Va. 628, 652, 857 S.E.2d 573, 588–89 (2021)*; *Curtis v. Highfill, 298 Va. 499, 505–06, 840 S.E.2d 321, 324 (2020)*; *Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 494, 706 S.E.2d 864, 871 (2011)*; *Green v. Ingram, 269 Va. 281, 292, 608 S.E.2d 917, 923 (2005)*; *Cowan v. Hospice Support Care, Inc., 268 Va. 482, 487, 603 S.E.2d 916, 918–19 (2004)*; *Doe v. Isaacs, 265 Va. 531, 535, 579 S.E.2d 174, 176 (2003)*; *Woods v. Mendez, 265 Va. 68, 76–77, 574 S.E.2d 263, 268 (2003)*; *PGI, Inc. v. Rathe Prods., Inc., 265 Va. 334, 345, 576 S.E.2d 438, 444 (2003)*; *Wilby v. Gostel, 265 Va. 437, 445, 578 S.E.2d 796, 800 (2003)*; *Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936)*.

### Practice Commentary

The Court recognizes three levels of negligence: simple negligence, gross negligence and willful and wanton negligence. *Cowan, 268 Va. at 486–87, 603 S.E.2d at 918*. The difference between simple negligence and gross negligence is one of degree. The difference between any form of negligence and causes of action for willful and wanton conduct, reckless conduct or intentional misconduct is a matter of kind. *Green, 269 Va. at 292, 608 S.E.2d at 923*. Ill will is not a necessary element of willful and wanton negligence. *Id., 269 Va. at 292, 608 S.E.2d at 923*. There is a substantial difference between intentional misconduct and willful and wanton conduct. For intentional misconduct, the actor must intend to cause harm. For willful and wanton conduct, the actor intends his act, but not the resulting harm. *Infant C., 239 Va. at 582, 291 S.E.2d at 328*. For willful and wanton conduct, it is sufficient that the actor has actual or constructive knowledge that injury will probably result from the act done or omitted. *Curtis, 298 Va. at 505, 840 S.E.2d at 324*; *Alfonso, 257 Va. at 545, 514 S.E.2d at 618*.

When a defendant has acted with wanton or willful negligence, he cannot use contributory negligence as a defense. *Thomas v. Snow, 162 Va. 654, 660, 174 S.E. 837, 839 (1934)*. If, however, the conduct of both plaintiff and defendant amounts to willful and wanton negligence, recovery is barred. *Griffin, 227 Va. at 322, 315 S.E.2d at 213*.

Wanton or willful negligence is an issue when recovery is sought for emotional distress where there has been no physical impact. *Hughes v. Moore, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973)*.

☞ ***Practice Pointer:*** Virginia recognizes a cause of action for willful or intentional infliction of emotional harm without impact or contact. See *Carstensen v. Chrisland Corp., 247 Va. 433, 446, 442 S.E.2d 660, 668 (1994)*; *Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974)*; Instruction No. 40.050, Intentionally Inflicted Emotional Distress: Finding.

### *ALERTS:*

- In a wrongful death case, punitive damages are available on a showing of

willful and wanton conduct. Va. Code Ann. § 8.01-52(5). Plaintiff does not need to prove the defendant's conduct was "egregious," and to include such language in the instruction is error. *Cain v. Lee, 290 Va. 129, 135, 772 S.E.2d 894, 896–97 (2015)* (interpreting Va. Code Ann. § 8.01-44.5).

- Although the court has distinguished willful negligence from wanton negligence, definition of the two terms together is the standard, and apparently accepted, practice. See *Philip Morris Inc., 235 Va. at 407–08, 368 S.E.2d at 283*; *Griffin, 227 Va. at 321, 315 S.E.2d at 213*; *Baker v. Marcus, 201 Va. 905, 909, 114 S.E.2d 617, 621 (1960)*; *Boward, 197 Va. at 231, 89 S.E.2d at 35*; *Friedman, 166 Va. at 68, 184 S.E. at 187*. See Instruction Nos. 4.010, Negligence: Burden of Proof, and 9.080, Punitive Damages.

- In a personal injury or wrongful death case arising from a motor vehicle, engine, or train operated by an intoxicated defendant, the defendant's conduct shall be presumed willful or wanton as to show a conscious disregard for the rights of others under certain circumstances. Va. Code Ann. § 8.01-44.5. See Instruction No. 15.005, Punitive Damages: Intoxicated Driver.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.01, 25.02, 25.05

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-20, 5-2, 5-3, 5-4, 5-7, 7-8, 7-15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.6, 2.7, 2.9, 2.11, 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Negligence §§ 1 through 69

# Chapter 5

# CAUSATION

**Scope Note**

**Instruction No. 5.000** **Definition of Proximate Cause**

**Instruction No. 5.005** **Multiple Proximate Causes**

**Instruction No. 5.010** **Definition of Superseding Cause**

# SCOPE NOTE

This chapter provides model instructions pertaining to the issue of causation. Proximate cause is defined in Instruction No. 5.000. Where a case involves more than one proximate cause, see Instruction No. 5.005 for an explanation of the principle of multiple proximate causes. Superseding cause is defined in Instruction No. 5.010.

**Instruction No. 5.000**
**Definition of Proximate Cause**

**A proximate cause of [an accident; an injury; a damage] is a cause that, in natural and continuous sequence, produces the [accident; injury; damage]. It is a cause without which the [accident; injury; damage] would not have occurred.**

## Sources & Authority

**Principal Governing Statutes:** None.

**Case Authority:** *Dorman v. State Indus., Inc., 292 Va. 111, 122–23, 787 S.E.2d 132, 138–39 (2016)*; *Wagoner v. Commonwealth, 289 Va. 476, 485–86, 770 S.E.2d 479, 484–85 (2015)*; *Harman v. Honeywell Int'l, Inc., 288 Va. 84, 103–04, 758 S.E.2d 515, 526–27 (2014)*; *Ford Motor Co. v. Boomer, 285 Va. 141, 150, 736 S.E.2d 724, 728 (2013)*; *Wells v. Whitaker, 207 Va. 616, 622, 151 S.E.2d 422, 428 (1966).*

**Other Relevant Decisions:** *AlBritton v. Commonwealth, 299 Va. 392, 406 n.8, 853 S.E.2d 512, 520 n.8 (2021)*; *Levenson v. Commonwealth, 68 Va. App. 255, 259–262, 808 S.E.2d 196, 198–200 (2017); RGR, LLC v. Settle, 288 Va. 260, 292–94, 764 S.E.2d 8, 27 (2014)*; *Howell v. Sobhan, 278 Va. 278, 283–84, 682 S.E.2d 938, 941–42 (2009), Holmes v. Levine, 273 Va. 150, 158–60, 639 S.E.2d 235, 239 (2007)*; *Blue Ridge Serv. Corp. v. Saxon Shoes, Inc., 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006)*; *Atrium Unit Owners Ass'n v. King, 266 Va. 288, 293–94, 585 S.E.2d 545, 548 (2003)*; *Molchon v. Tyler, 262 Va. 175, 182, 546 S.E.2d 691, 696 (2001)*; *Sugarland Run Homeowners Ass'n v. Halfmann, 260 Va. 366, 372, 535 S.E.2d 469, 472 (2000)*; *Cooper Indus., Inc. v. Melendez, 260 Va. 578, 589, 537 S.E.2d 580, 587 (2000)*; *Atkinson v. Scheer, 256 Va. 448, 454, 508 S.E.2d 68, 71 (1998)*; *Jenkins v. Payne, 251 Va. 122, 128, 465 S.E.2d 795, 799 (1996)*; *Thomas v. Settle, 247 Va. 15, 20, 439 S.E.2d 360, 363 (1994)*; *Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 269, 441 S.E.2d 1, 4 (1994)*; *Commercial Distrib. v. Blankenship, 240 Va. 382, 395, 397 S.E.2d 840, 847 (1990)*; *Banks v. City of Richmond, 232 Va. 130, 135, 348 S.E.2d 280, 282–83 (1986)*; *Coleman v. Blankenship Oil Corp., 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980)*; *Beale v. Jones, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970).*

### Practice Commentary

Proximate cause issues are ordinarily questions of fact for a jury to determine rather than issues to be determined by the court as a matter of law. *Rascher v. Friend, 279 Va. 370, 377, 689 S.E.2d 661, 666 (2010)*; *Kellermann v. McDonough, 278 Va. 478, 493, 684 S.E.2d 786, 793 (2009).*

***Intervening and Superseding Causes.*** The *Beale* decision included in the definition of proximate cause the phrase "unbroken by an efficient intervening cause." *Beale, 210 Va. at 522, 171 S.E.2d at 853*. That phrase is not included in this instruction since most cases do not raise the issue. Also, the additional language may confuse the jury because there may be more than one proximate cause of an event. *Rascher, 279 Va. at 376, 689 S.E.2d at 665*. Instruction No. 5.005, Multiple Proximate Causes, addresses that circumstance without unnecessarily referring to "intervening causes." If, however, intervening cause is an issue, Instruction No. 5.010, Definition of Superseding Cause, and Instruction No. 4.020, Concurring Negligence, should be used in addition to this instruction.

The negligent driving of a teenager was held to not be the superseding cause of

the death of a minor where negligent supervision and negligent assumption of duty of care by adults could have been a proximate cause of the death. *Kellermann, 278 Va. at 494, 684 S.E.2d at 794.*

Because there may be more than one proximate cause of an injury, the instruction refers to "a proximate cause" instead of "the proximate cause." This is because an intervening cause (as opposed to a superseding cause) may or may not relieve a defendant from liability for his negligence. *Kellermann, 278 Va. at 493, 684 S.E.2d at 793.*

Due to the potential for confusing the jury about the burden of proof, there is no error in the trial court's refusal to instruct the jury that "proximate cause need not be established with such certainty so as to exclude every other possible conclusion." *Harman, 288 Va. at 103–04, 758 S.E.2d at 527.*

***Criminal Cases.*** The established principles of proximate causation are applicable in both civil and criminal trials. *Levenson, 68 Va. App. at 259–61, 808 S.E.2d at 198–200.* A defendant in an involuntary manslaughter case is not relieved of criminal responsibility by an intervening cause when his actions put into motion the high-speed chase that leads to a third party's death by a police officer's vehicle. *Brown v. Commonwealth, 278 Va. 523, 529–530, 685 S.E.2d 43, 46–47 (2009).*

***Damage/Injury.*** It is not required that a defendant foresee the precise injury or damage in order for the plaintiff to recover. *Interim Pers. of Cent. Va., Inc. v. Messer, 263 Va. 435, 442, 559 S.E.2d 704, 708 (2002).* See also Instruction No. 4.018, Foreseeable Consequences.

For a discussion of proximate causation and aggravation of injury, see *Smith v. Kim, 277 Va. 486, 675 S.E.2d 193 (2009).*

☞ ***PRACTICE POINTER:*** In *Blondel v. Hays, 241 Va. 467, 473, 403 S.E.2d 340, 343 (1991)*, the Supreme Court stated that "in medical malpractice-wrongful death cases . . . a defendant physician's destruction of any substantial possibility of the patient's survival is a proximate cause of the patient's death." In a later case, *Wagoner, 289 Va. at 485–86, 770 S.E.2d at 484–85,* the Court stated that "although the loss of a substantial possibility of survival may be evidence of proximate cause in a medical malpractice case, it is not itself a principle of proximate cause. A proximate cause is an act or omission. The loss of a substantial possibility of survival, on the other hand, is neither an act nor an omission; it is the *result* of an act or omission. In other words, the loss of a substantial possibility of survival is evidence that would support a finding of causation for the 'event' ". The court acknowledged its statement in *Blondel*, quoted above, stating that "[a]lthough this language would appear to contradict our holding that proximate cause and the loss of a substantial possibility of survival are distinct concepts, when parsed correctly, it is apparent we were referring to the defendant physician's actions or omissions that resulted in the destruction of the possibility of survival as the proximate cause, not the loss itself." *Id. at 486 n.4, 770 S.E.2d at 485.*

☞ ***PRACTICE POINTER:*** In a medical malpractice wrongful death case arising

from the physician defendants' alleged failure to examine, diagnose, and treat the patient during a progression of symptoms, expert testimony that prompt diagnosis and treatment of the patient would have "certainly" or "likely" saved the patient's life provided sufficient evidence of causation for consideration by the jury. *Tahboub v. Thiagarajah, 298 Va. 366,377–78, 837 S.E.2d 752, 757–58 (2020).*

☞ ***PRACTICE POINTER:*** Proximate cause and contributory negligence may be an issue in a medical malpractice case if the contributory negligence is "contemporaneous" with the main fact asserted as negligence on the physician's part. *Gravitt v. Ward, 258 Va. 330, 335, 518 S.E.2d 631, 634 (1999).* This means that in an action for medical malpractice, the patient's negligent act must be contemporaneous with the main fact asserted as the negligent act of the physician. *Sawyer v. Comerci, 264 Va. 68, 75, 563 S.E.2d 748, 752–53 (2002); Ponirakis v. Choi, 262 Va. 119, 125, 546 S.E.2d 707, 711 (2001).*

***ALERTS:***

- Voluntary conduct of the plaintiff that is illegal or unlawful may be a defense in a tort claim if such unlawful conduct was a "direct cause" of the injury. For the "illegality" defense to apply, a party's consent to an illegal act must have been freely given without the taint of fraud or duress. *Johnson v. Campbell, 258 Va. 453, 456–57, 521 S.E.2d 764, 766 (1999).*

- When multiple proximate causes are present, see Instruction No. 5.005, Multiple Proximate Causes.

- The appropriate causation standard for mesothelioma cases is "multiple-sufficient-causes." *Boomer, 285 Va. at 158, 736 S.E.2d at 732.* Under this approach, "[i]f multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each is regarded as a factual cause of the harm." *Id. at 157, 736 S.E.2d at 732.* The multiple-sufficient causes approach is appropriate "whether the concurring causes are all tortious in nature or whether some are innocent." *Id. at 158, 736 S.E.2d at 732.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 4: Causation

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02[9]

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5[A]; 2.12[B]

Kent Sinclair, VIRGINIA REMEDIES, §§ 25-2, 25-5

MICHIE'S JURISPRUDENCE, Negligence §§ 20 through 23

## Instruction No. 5.005
## Multiple Proximate Causes

**There may be more than one proximate cause of an** [injury; death]**. If the negligence of a defendant proximately caused injury to** (name of plaintiff/decedent) **then the negligence of that defendant is a proximate cause of** [name of plaintiff/ decedent's] [damages; death] **even if there were other acts or omissions that caused** (name of plaintiff / decedent)**'s** [injuries; death]**.**

[If you find that there is a superseding cause for the plaintiff's [injuries; death], you shall find for the defendant(s)].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Harman v. Honeywell Int'l, Inc., 288 Va. 84, 103–04, 758 S.E.2d 515, 526–27 (2014)*; *Ford Motor Co. v. Boomer, 285 Va. 141, 150–51, 736 S.E.2d 724, 728 (2012)*; *Williams v. Cong Le, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008)*; *Holmes v. Levine, 273 Va. 150, 159, 639 S.E.2d 235, 239 (2007)*; *Doherty v. Aleck, 273 Va. 421, 428, 641 S.E.2d 93, 97 (2007)*; *Panousos v. Allen, 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993)*; *Coleman v. Blankenship Oil Corp., 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980)*; *Etheridge v. Norfolk S. R. Co., 143 Va. 789, 799, 129 S.E. 680, 683 (1925)*.

**PRACTICE COMMENTARY:**

Instruction No. 5.000, Definition of Proximate Cause, should always be given. This instruction addresses a circumstance when the evidence involves multiple proximate causes and should be given only when appropriate. See Alerts, below.

This instruction may be used in conjunction with Instruction No. 5.010, Definition of Superseding Cause. If both instructions are offered, the last bracketed sentence of this Instruction should be included in the instruction. Consideration should also be given as to whether Instruction No. 4.020, Concurring Negligence, may be appropriate.

***ALERTS:***

- In *Harman, 288 Va. at 103–04, 758 S.E.2d at 526–27*, the Court held that the trial court did not err in refusing an instruction which provided that "[t]here may be more than one proximate cause." The Court reasoned that the plaintiff presented evidence that the accident was the product of a single cause. Moreover, the Court explained that Instruction 5.000 referred to "a" proximate cause, permitting the jury to conclude that there was more than one proximate cause. *Id.* In contrast, in *Holmes, 273 Va. at 159, 639 S.E.2d at 239 (2007)*, the Court reversed the trial court for failing to provide an instruction regarding multiple potential proximate causes. In *Holmes*, the plaintiff's theory was that there were two possible proximate causes of the decedent's death, and the plaintiff put on considerable evidence regarding both causes. *Id.* In addition, the instruction on proximate cause mentioned "a" proximate cause, but also employed the definite article "the" in instructing the jury on "the proximate cause." *Id.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 4: Causation

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02[9]

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5[A]; 2.12[B]

Kent Sinclair, VIRGINIA REMEDIES, §§ 25-2, 25-5

MICHIE'S JURISPRUDENCE, Negligence §§ 20 through 23

## Instruction No. 5.010
## Definition of Superseding Cause

**A superseding cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the defendant's negligent act and the plaintiff's injury. A superseding cause breaks the chain of events so that the defendant's original negligent act is not a proximate cause of the plaintiff's injury in the slightest degree.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**PRINCIPAL CASE AUTHORITY:** *Dorman v. State Industries, Inc., 292 Va. 111, 123–25, 787 S.E.2d 132, 139–40 (2016).*

**OTHER RELEVANT DECISIONS:** *Levenson v. Commonwealth, 68 Va. App. 255, 259–262, 808 S.E.2d 196, 198–200 (2017); Rich v. Commonwealth, 292 Va. 791, 799–802, 793 S.E.2d 798, 802–04 (2016); Smith v. McLaughlin, 289 Va. 241, 268–69, 769 S.E.2d 7, 21–22 (2015); Noakes v. Commonwealth, 280 Va. 338, 348–49, 699 S.E.2d 284, 290 (2010); Kellermann v. McDonough, 278 Va. 478, 493–94, 684 S.E.2d 786, 793–94 (2009); Williams v. Joynes, 278 Va. 57, 63, 677 S.E.2d 261, 264 (2009); Williams v. Cong Le, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008); Atkinson v. Scheer, 256 Va. 448, 454, 508 S.E.2d 68, 71–72 (1998); Jenkins v. Payne, 251 Va. 122, 129, 465 S.E.2d 795, 799 (1996); Panousos v. Allen, 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993); R.B. Hazard, Inc. v. Panco, 240 Va. 438, 443–44, 397 S.E.2d 866, 869 (1990); Koutsounadis v. England, 238 Va. 128, 132, 380 S.E.2d 644, 646 (1989); Philip Morris Inc. v. Emerson, 235 Va. 380, 397, 368 S.E.2d 268, 277 (1988); Coleman v. Blankenship Oil Corp., 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980); Cox v. Mabe, 214 Va. 705, 708, 204 S.E.2d 253, 256 (1974); Roanoke Ry. & Elec. Co. v. Whitner, 173 Va. 253, 258–59, 3 S.E.2d 169, 171 (1939); Spence v. American Oil Co., 171 Va. 62, 69–70, 197 S.E. 468, 471 (1938); Wallace v. Jones, 168 Va. 38, 42, 190 S.E. 82, 84 (1937); City of Richmond v. Gay, 103 Va. 320, 324, 49 S.E. 482, 483 (1905).*

### PRACTICE COMMENTARY

The use of this instruction was approved in *Dorman, 292 Va. at 125, 787 S.E.2d at 139.*

Not every intervening cause is a superseding cause. *Kellermann, 278 Va. at 494, 684 S.E.2d at 794.* For an intervening negligent act between the defendant's negligence and the injury to relieve a defendant of liability, it must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's negligence contributing thereto in the slightest degree, produces the injury. *Id. at 493, 684 S.E.2d at 793–94*; *Williams, 278 Va. at 63, 677 S.E.2d at 264.* For example, the negligent driving of a teenager was held not to be the superseding cause of the death of a minor where negligent supervision and negligent assumption of duty of care by adults could be a proximate cause of the death. *Kellermann, 278 Va. at 494, 684 S.E.2d at 793.*

Pursuant to the provisions of Va. Code Ann. § 46.2-1088.3(F), any sale, installation, reinstallation, or replacement of a motor vehicle airbag in violation of that statute shall not be construed as a superseding cause that limits the liability of any party in any civil action. See Instruction No. 17.090 Airbags, for an instruction that may be applicable in those situations.

☞ ***PRACTICE POINTER:*** When this instruction is proffered, consideration should be given to whether Instruction No. 4.020, Concurring Negligence, and Instruction

No. 5.005, Multiple Proximate Causes, would also be appropriate.

***ALERTS:***

- An intervening cause is not a superseding cause if it was "put into operation by the defendant's wrongful act or omission." *Kellermann, 278 Va. at 494, 684 S.E.2d at 794; Coleman, 221 Va. at 131, 267 S.E.2d at 147*; *Jefferson Hospital, Inc. v. Van Lear, 186 Va. 74, 81, 41 S.E.2d 441, 444 (1947).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 4: Causation

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02[9]

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5[A]; 2.12[B]

Kent Sinclair, VIRGINIA REMEDIES, §§ 25-2, 25-5

MICHIE'S JURISPRUDENCE, Negligence §§ 20 through 23

# Chapter 6

# CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK

## Scope Note

**Instruction No. 6.000** **Definition of Contributory Negligence**

**Instruction No. 6.005** **Child Under Seven Incapable of Contributory Negligence**

**Instruction No. 6.010** **Duty to Children Under Fourteen Years of Age**

**Instruction No. 6.020** **Negligence of Child of Seven Years Old or Older But Less than Fourteen**

**Instruction No. 6.030** **Standard of Conduct for Minor of Fourteen Years Old or Older But Less than Eighteen**

**Instruction No. 6.040** **Contributory Negligence: Burden of Proof**

**Instruction No. 6.050** **Contributory Negligence: Parties' Negligence Not Compared**

**Instruction No. 6.055** **Contributory Negligence: Availability of Defense (Willful and Wanton)**

**Instruction No. 6.060** **Contributory Negligence: Right to Assume Ordinary Care**

**Instruction No. 6.100** **Definition of Assumption of the Risk**

**Instruction No. 6.110** **Assumption of the Risk: Burden of Proof**

# SCOPE NOTE

This chapter addresses the defenses of contributory negligence (defined by Instruction No. 6.000) and assumption of the risk (defined by Instruction No. 6.100). Contributory negligence and assumption of the risk are distinct, but not mutually exclusive defenses. Accordingly, when they overlap, the defendant is entitled to instructions on both defenses.

The defendant has the burden of proof for both defenses. Instruction Nos. 6.040 and 6.110 state the burden of proof for contributory negligence and assumption of risk, respectively. The circumstances under which a defendant may not rely on the defense of contributory negligence as a bar to plaintiff's recovery are addressed in Instruction 6.055. If the defendant proves that the plaintiff was contributorily negligent, and defendant is not otherwise prevented from relying on that defense, the plaintiff is barred from recovering on his claim. Likewise, if the defendant proves that the plaintiff assumed the risk of harm, the plaintiff is barred from recovering on his claim. Exceptions to this rule include cases involving maritime law, *Matthews v. Commonwealth, Dept. of Transp., 253 Va. 180, 182, 482 S.E.2d 810, 811 (1997)*, and in certain cases involving railroads. See Instruction 18.090 (failure of railroad to sound an audible signal while approaching a crossing) and Instruction No. 21.030 (contributory negligence of employee plaintiffs in F.E.L.A. cases).

Each party has the right to assume that the other will use ordinary care until he realizes, or should realize, that the other is not going to do so. Accordingly, supplementing Instruction No. 6.060, on the right to assume ordinary care, with Instruction No. 4.020, on concurring negligence, and Instruction Nos. 7.030 and 7.040, on the last clear chance doctrine, may prove helpful.

See Instruction Nos. 6.005 (child under seven incapable of contributory negligence), 6.010 (duty to children under fourteen), 6.020 (negligence of child seven or older but less than fourteen), and 6.030 (standard of conduct for minor of fourteen but less than eighteen) for duty of care to and contributory negligence of children and minors.

When the rescue doctrine applies, use Instruction No. 7.020, Rescue. See *Kimble v. Carey, 279 Va. 652, 661–62, 691 S.E.2d 790, 795 (2010).*

Other specific contributory negligence and assumption of risk instructions are included where appropriate with other topics. *E.g.*, Instruction No. 9.110 (the contributory negligence of a beneficiary in a wrongful death action), *Chapman v. City of Virginia Beach, 252 Va. 186, 193–94, 475 S.E.2d 798, 802–03 (1996)*; Instruction Nos. 15.010 and 15.020, (contributory negligence and assumption of risk of passengers); Instruction Nos. 21.020 and 21.030, (contributory negligence of a railroad employee); Instruction No. 29.040, (contributory negligence with respect to a caged, wild animal); Instruction Nos. 34.100 and 34.110, (assumption of risk in products liability cases); Instruction Nos. 34.190 and 34.200, (contributory negligence-like defense to products liability suits); and Instruction No. 35.110, (patient's duty regarding his health).

For medical malpractice cases, see *Sawyer v. Comerci, 264 Va. 68, 75, 563 S.E.2d 748, 752 (2002); Gravitt v. Ward, 258 Va. 330, 335, 518 S.E.2d 631, 633–34 (1999).* For legal malpractice cases, see *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 432, 457 S.E.2d 28, 32 (1995).*

**Instruction No. 6.000**
**Definition of Contributory Negligence**

**Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of this case.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Fultz v. Delhaize Am., Inc., 278 Va. 84, 90, 677 S.E.2d 272, 275 (2009)*; *Moses v. Southwestern Va. Transit Mgmt. Co. Inc., 273 Va. 672, 678, 643 S.E.2d 156, 159 (2007)*; *Burroughs v. Keffer, 272 Va. 162, 167, 630 S.E.2d 297, 300–01 (2006)*; *Jenkins v. Pyles, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005)*; *Sawyer v. Comerci, 264 Va. 68, 74, 563 S.E.2d 748, 752 (2002)*; *Ponirakis v. Choi, 262 Va. 119, 124–25, 546 S.E.2d 707, 710–11 (2001)*; *Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 246–47, 520 S.E.2d 164, 171 (1999)*; *Hoar v. Great Eastern Resort Mgmt., Inc., 256 Va. 374, 390, 506 S.E.2d 777, 787 (1998)*; *Chapman v. City of Virginia Beach, 252 Va. 186, 193–94, 475 S.E.2d 798, 803 (1996)*; *Gardner v. Phipps, 250 Va. 256, 258–60, 462 S.E.2d 91, 93 (1995)*; *Waters v. Safeway Stores, Inc., 246 Va. 269, 271, 435 S.E.2d 380, 381–82 (1993)*; *Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 358, 397 S.E.2d 821, 823–24 (1990)*; *Philip Morris Inc. v. Emerson, 235 Va. 380, 402–03, 368 S.E.2d 268, 280 (1988)*; *Arndt v. Russillo, 231 Va. 328, 331–32, 343 S.E.2d 84, 86–87 (1986)*; *Amusement Slides Corp. v. Lehmann, 217 Va. 815, 818–19, 232 S.E.2d 803, 805 (1977)*; *Ewell v. Elliott, 203 Va. 201, 202, 123 S.E.2d 391, 392 (1962)*; *Yeary v. Holbrook, 171 Va. 266, 285, 198 S.E. 441, 450 (1938).*

### Practice Commentary

The essence of contributory negligence is carelessness and involves an objective test, i.e. whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. *Jenkins, 269 Va. at 388, 611 S.E.2d at 407; Artrip, 240 Va. at 358, 397 S.E.2d at 823–24.* Assumption of the risk is measured by a subjective standard, i.e., the reasonableness of the actions of the defendant under the circumstances of the case. *Nelson v. Great Eastern. Resort Mgmt., Inc., 265 Va. 98, 103, 574 S.E.2d 277, 280 (2003); Waters, 246 Va. at 271, 435 S.E.2d at 381; Artrip, 240 Va. at 358, 397 S.E.2d at 823–24.*

Negligence, contributory negligence, and proximate cause are ordinarily questions of fact for the jury to determine. The specific issue becomes one of law for the circuit court to decide only when reasonable minds could not differ about what conclusion could be drawn from the evidence. *Kimble v. Carey, 279 Va. at 663, 691 S.E.2d at 795*; *Rascher v. Friend, 279 Va. 370, 377, 689 S.E.2d 661, 666 (2010)*; *Kellermann v. McDonough, 278 Va. 478, 493, 684 S.E.2d 786, 793 (2009); Burroughs, 272 Va. at 168, 630 S.E.2d at 300; Jenkins, 269 Va. at 389, 611 S.E.2d at 407.*

Contributory negligence is not a defense in an action for breach of implied warranty of fitness. *Brockett v. Harrell Bros., Inc., 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965).* Assumption of the risk is not a defense in an action for breach of implied warranty. *Wood v. Bass Pro Shops, Inc., 250 Va. 297, 300–01, 462 S.E.2d 101, 103 (1995).*

Under the rescue doctrine, the technical rules of contributory negligence and

assumption of risk are not applied. When the rescue doctrine applies, the rescuer can recover for his injuries where his actions are not rash and reckless. *Kimble v. Carey, 279 Va. 652, 661–62, 691 S.E.2d 790, 795 (2010).* See the Case Authority and Practice Commentary for Instruction No. 7.020.

☞ ***PRACTICE POINTER:*** The "choice of path" doctrine may present an issue of contributory negligence. See *Gardner, 250 Va. at 259, 462 S.E.2d at 93.* It may also present an issue of assumption of risk.

Contributory negligence may be an issue in a medical malpractice case if the contributory negligence is "contemporaneous" with the negligence of the physician. *Gravitt v. Ward, 258 Va. 330, 335, 518 S.E.2d 631, 634 (1999)*; *Sawyer, 264 Va. at 75, 563 S.E.2d at 752–53.*

### ***ALERTS:***

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

**Instruction No. 6.005**
**Child Under Seven Incapable of Contributory Negligence**

**A child under seven years of age is incapable of being contributorily negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Burnette v. McDonald, 206 Va. 186, 189, 142 S.E.2d 495, 498 (1965)*; *Sheckler v. Anderson, 182 Va. 701, 707, 29 S.E.2d 867, 869 (1944).*

**PRACTICE COMMENTARY**

None.

☞***PRACTICE POINTER:*** See Instruction No. 6.010 (duty to children under fourteen), Instruction No. 6.020 (negligence of child seven or older but less than fourteen), and, Instruction No. 6.030 (standard of conduct for minor of fourteen but less than eighteen).

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.010
## Duty to Children Under Fourteen Years of Age

**If you believe by the greater weight of the evidence that the defendant saw, or in the exercise of ordinary care should have seen, the plaintiff near the scene of the accident, then the defendant had a duty to consider that the child might, upon childish impulse and heedless of danger, put himself in a position of peril. It then became the duty of the defendant to use the degree of care a reasonable person would use under the circumstances of this case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Burnette v. McDonald, 206 Va. 186, 189, 142 S.E.2d 495, 498 (1965)*; *Read v. Daniel, 197 Va. 853, 857, 91 S.E.2d 400, 404 (1956).*

### PRACTICE COMMENTARY

A child's conduct is not judged by the same rules as that of an adult; the younger the child, the greater the duty owed by a motor vehicle operator to avoid injuring the child. *Hall v. Hall, 240 Va. 360, 363–64, 397 S.E.2d 829, 831 (1990).*

☞ ***PRACTICE POINTER:*** See Instruction No. 6.005 (child under seven incapable of contributory negligence), Instruction No. 6.020 (negligence of child seven or older but less than fourteen), and Instruction No. 6.030 (standard of conduct for minor of fourteen but less than eighteen).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

**Instruction No. 6.020**

**Negligence of Child of Seven Years Old or Older But Less than Fourteen**

**A child seven years of age or older but less than fourteen is presumed incapable of negligence. However, you may find him or her negligent if:**

**(1) It is shown by the greater weight of the evidence that the child had the capacity to understand the nature of the danger and the peril associated with his conduct, taking into consideration the child's age, intelligence, and experience; and**

**(2) If you further find by the greater weight of the evidence that the child's conduct did not conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 246–47, 520 S.E.2d 164, 171 (1999)*; *Doe v. Dewhirst, 240 Va. 266, 268, 396 S.E.2d 840, 842 (1990)*; *Endicott v. Rich, 232 Va. 150, 156, 348 S.E.2d 275, 279 (1986)*; *Norfolk & Portsmouth Belt Line R.R. v. Barker, 221 Va. 924, 929–30, 275 S.E.2d 613, 616 (1981)*; *Gough v. Shaner, 197 Va. 572, 576, 90 S.E.2d 171, 175 (1955)*; *Norfolk S. Ry. v. Wood, 182 Va. 30, 35, 28 S.E.2d 15, 17 (1943)*.

### PRACTICE COMMENTARY

In *Barker, 221 Va. at 930, 275 S.E.2d at 617,* a ten-year-old boy was found contributorily negligent as a matter of law based on his own testimony that he knew he could get hurt by jumping on a train. *But see Endicott, 232 Va. at 157, 348 S.E.2d at 279*, where the Court held that defendant's evidence failed to show that the thirteen-year-old child was capable of understanding that the choice he made to avoid an accident—riding his bicycle to the other side of the road—was a dangerous choice.

☞ ***PRACTICE POINTER:*** The three traditional factors by which the standard of conduct of a child between the ages of seven and fourteen may be judged are age, intelligence and experience. The Supreme Court has held that "maturity" may be added to those factors in the appropriate case. *Va. Elec. & Power Co., 258 Va. at 252–253, 520 S.E.2d at 173–74.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.030
## Standard of Conduct for Minor of Fourteen Years Old or Older But Less than Eighteen

**The standard by which the conduct of a minor of fourteen years of age or older but less than eighteen is to be measured is that degree of care which persons of the same age, experience, intelligence, discretion, and knowledge would exercise under the circumstances of this case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993)*; *Meade v. Meade, 206 Va. 823, 829–30, 147 S.E.2d 171, 176 (1966)*; *Grant v. Mays, 204 Va. 41, 45, 129 S.E.2d 10, 13 (1963).*

### PRACTICE COMMENTARY

A child of fourteen years of age or older is presumed to have sufficient capacity to be capable of and chargeable with contributory negligence. *Carson, 245 Va. at 140, 427 S.E.2d at 192.* However, this presumption may be rebutted. *Meade, 206 Va. at 829, 147 S.E.2d at 176.*

In *Carson, 245 Va. at 140, 142, 427 S.E.2d at 192, 193*, the Court, using the standard of a "15-year-old exercising reasonable care," held the plaintiff pedestrian guilty of contributory negligence as a matter of law.

☞ ***PRACTICE POINTER:*** In a case involving the contributory negligence of a child of seven years of age or older but less than fourteen, the Supreme Court held that "maturity" may be added to the list of factors by which a child's conduct is to be measured in the appropriate case. *Va. Elec. & Power Co. v. Dungee, 258 Va.235, 247, 520 S.E.2d 164, 174 (1999).*

### *ALERTS:*

- A minor is held to the same standard of care as an adult when operating a motor vehicle. *Thomas v. Settle, 247 Va. 15, 21, 439 S.E.2d 360, 364 (1994).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.040
## Contributory Negligence: Burden of Proof

**When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *AlBritton v. Commonwealth, 299 Va. 392, 410–11, 853 S.E. 2d 512, 523 (2021)*; *Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672, 678–79, 643 S.E.2d 156, 160 (2007); Sawyer v. Comerci, 264 Va. 68, 74–75, 563 S.E.2d 748, 752–53 (2002)*; *Ponirakis v. Choi, 262 Va. 119, 124–25, 546 S.E.2d 707, 710–11 (2001)*; *Wright v. Norfolk & W. Ry., 245 Va. 160, 170, 427 S.E.2d 724, 729 (1993)*; *Kelly v. Va. Elec. & Power Co., 238 Va. 32, 39, 381 S.E.2d 219, 222 (1989)*; *Karim v. Grover, 235 Va. 550, 552, 369 S.E.2d 185, 186 (1988)*; *Whitfield v. Dunn, 202 Va. 472, 477, 117 S.E.2d 710, 714 (1961)*; *Burks v. Webb, 199 Va. 296, 307–10, 99 S.E.2d 629, 638–40 (1957).*

**PRACTICE COMMENTARY** Negligence, contributory negligence and proximate cause ordinarily are questions of fact for the jury to determine, rather than questions of law to be determined by the court. *Rascher v. Friend, 279 Va. 370, 377, 689 S.E.2d 661, 665 (2010)*; *Kimble v. Carey, 279 Va. 652, 663, 691 S.E.2d 790, 796 (2010)*; *Kellermann v. McDonough, 278 Va. 478, 493, 684 S.E.2d 786, 793 (2009).*

***ALERTS:***

- Contributory negligence does not constitute a defense unless pleaded or shown by the plaintiff's evidence. Va. Sup. Ct. R. 3:18(c).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.050
## Contributory Negligence: Parties' Negligence Not Compared

**If you find from the greater weight of the evidence that both the plaintiff and the defendant were negligent and that their negligence proximately contributed to the accident, you may not compare the negligence of the parties. Any negligence of the plaintiff which was a proximate cause of the accident will bar the plaintiff from recovering.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sawyer v. Comerci, 264 Va. 68, 75, 563 S.E.2d 748, 752 (2002)*; *Fein v. Wade, 191 Va. 203, 209–10, 61 S.E.2d 29, 31–32 (1950)*; *Yeary v. Holbrook, 171 Va. 266, 286–87, 198 S.E. 441, 450 (1938).*

### PRACTICE COMMENTARY

This has often been included as the final paragraph of the instruction on contributory negligence. See *Smith v. Virginia Elec. & Power Co., 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963).*

In *Thomas v. Snow, 162 Va. 654, 660, 174 S.E. 837, 839 (1934)*, the Supreme Court of Virginia stated that with respect to the defense of contributory negligence, "[i]t is important to mark the distinction between acts or omissions [of the defendant] which constitute gross negligence and those which are termed wilful or wanton, because it is usually held that in the former[,] contributory negligence on the part of plaintiff will defeat recovery, while in the latter[,] it will not."

In circumstances where the conduct of one or both parties may be described as willful and wanton, and such conduct proximately contributes to the accident giving rise to plaintiff's claim, see Instruction No. 6.055.

### *ALERTS:*

- Exceptions to this rule include cases involving maritime law, *Matthews v. Commonwealth, Dept. of Transp., 253 Va. 180, 182, 482 S.E.2d 810, 811 (1997)*, and in certain cases involving railroads. See 45 U.S.C. § 51 et seq. (Federal Employers' Liability Act ["FELA"]); Va. Code Ann. § 8.01-58; Instruction 18.090 (failure of railroad to sound an audible signal while approaching a crossing); and, Instruction No. 21.030 (contributory negligence of employee plaintiffs in railroad cases).

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

**Instruction No. 6.055**
**Contributory Negligence: Availability of Defense (Willful and Wanton)**

**If you find from the greater weight of the evidence that the defendant engaged in willful and wanton conduct that proximately contributed to the accident, and if you further find from the greater weight of the evidence that the plaintiff engaged in conduct that proximately contributed to that same accident, but that such conduct was only** [negligent; grossly negligent]**, then defendant cannot rely upon contributory negligence as a defense to plaintiff's claim.**

**However, if you find from the greater weight of the evidence that the defendant engaged in willful and wanton conduct that proximately contributed to the accident, and you further find that the plaintiff engaged in willful and wanton conduct that proximately contributed to that same accident, then plaintiff's conduct bars his recovery.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Wolfe v. Baube, 241 Va. 462, 465–66; 403 S.E.2d 338, 339–40 (1991)*; *Griffin v. Shively, 227 Va. 317, 322, 315 S.E.2d 210, 213 (1984)*; *Thomas v. Snow, 162 Va. 654, 660–61, 174 S.E. 837, 840 (1934).*

### PRACTICE COMMENTARY

The Supreme Court of Virginia has held that "all degrees of negligence ordinarily are issues for a jury." *Wolfe, 241 Va. at 466, 403 S.E.2d at 340.* Accordingly, a jury may determine the degrees of both the plaintiff's and the defendant's negligence and whether the defense of contributory negligence is available to the defendant. *Griffin, 227 Va. at 323, 315 S.E.2d at 214.* However, when reasonable minds could not differ, the issue of whether a litigant's conduct amounts to contributory negligence, or willful and wanton negligence, becomes an issue of law for the court to determine. *Wolfe, 241 Va. at 466, 403 S.E.2d at 340* (willful and wanton conduct); *Griffin, 227 Va. at 320–21, 315 S.E.2d at 212* (explaining that "[g]enerally, negligence (whether ordinary, gross, or willful and wanton), contributory negligence, and proximate cause are issues for a jury's resolution" and that "[t]hey only become questions of law to be determined by a court, when reasonable minds could not differ"); *Meeks v. Hodges, 226 Va. 106, 109, 306 S.E.2d 879, 881 (1983)*; *Virginia Electric & Power Co. v. Winesett, 225 Va. 459, 464, 303 S.E.2d 868, 872 (1983)*; *Community Bus Co. v. Windley, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983).*

In *Thomas, 162 Va. at 660, 174 S.E. at 839*, the Supreme Court of Virginia stated that with respect to the defense of contributory negligence, "[i]t is important to mark the distinction between acts or omissions [of the defendant] which constitute gross negligence and those which are termed wilful or wanton, because it is usually held that in the former[,] contributory negligence on the part of plaintiff will defeat recovery, while in the latter[,] it will not."

For instructions on the definitions of negligence, gross negligence, and willful and wanton conduct, see Instruction Nos. 4.000, 4.030, and 4.040.

For an instruction defining greater weight of the evidence, see Instruction No.3.100.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2,

11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.060
## Contributory Negligence: Right to Assume Ordinary Care

**The plaintiff has a right to assume that the defendant will** [use ordinary care; obey the law] **until he realizes, or in the exercise of ordinary care should realize, that the defendant is not going to do so.**

[The defendant has a right to assume that the plaintiff will [use ordinary care; obey the law] until he realizes, or in the exercise of ordinary care should realize, that the plaintiff] is not going to do so.

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**PRINCIPAL CASE AUTHORITY:** *Citizens Rapid Transit Co. v. O'Hara, 203 Va. 979, 982, 128 S.E.2d 270, 273 (1962)*; *Tellis v. Traynham, 195 Va. 447, 450, 78 S.E.2d 581, 583 (1953)*; *Millard v. Cohen, 187 Va. 44, 51, 46 S.E.2d 2, 5 (1948).*

**OTHER RELEVANT CASES:** *Hawthorne v. VanMarter, 279 Va. 566, 585, 592 S.E.2d 226, 238 (2010)*; *Hoar v. Great Eastern Resort Mgmt., Inc., 256 Va. 374, 390, 506 S.E.2d 777, 787 (1998)*; *Ashby v. Faison & Assocs., 247 Va. 166, 169, 440 S.E.2d 603, 604 (1994)*; *Shiflett v. M. Timberlake, Inc., 205 Va. 406, 411, 137 S.E.2d 908, 912 (1964)*; *Harris Motor Lines, Inc. v. Green, 184 Va. 984, 37 S.E.2d 4 (1946).*

### PRACTICE COMMENTARY

Although this instruction is generally used by a plaintiff seeking to avoid a finding of contributory negligence, the defendant also has a right to assume that the plaintiff will use ordinary care. Where the facts of the case warrant instructing the jury on the defendant's right to assume that the plaintiff will use ordinary care, the bracketed second paragraph of the model instruction should be used instead of the first paragraph.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.100
## Definition of Assumption of the Risk

**If you find by the greater weight of the evidence that the plaintiff fully understood the nature and extent of a known danger, and if he voluntarily exposed himself to it, he assumed the risk of injuring himself from that danger. The plaintiff cannot recover for injuries that proximately resulted from assuming the risk of a known danger.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Thurmond v. Prince William Prof'l Baseball Club Inc., 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003)*; *Nelson v. Great Eastern Resort Mgmt., Inc., 265 Va. 98, 103, 574 S.E.2d 277, 280 (2003)*; *Hoar v. Great Eastern. Resort Mgmt., Inc., 256 Va. 374, 389, 506 S.E.2d 777, 787 (1998)*; *Waters v. Safeway Stores, 246 Va. 269, 271, 435 S.E.2d 380, 381 (1993)*; *Greater Richmond Transit Co. v. Wilkerson, 242 Va. 65, 71, 406 S.E.2d 28, 32 (1991)*; *Cofield v. Nuckles, 239 Va. 186, 191, 387 S.E.2d 493, 496 (1990)*; *Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 358, 397 S.E.2d 821, 824 (1990)*; *Philip Morris Inc. v. Emerson, 235 Va. 380, 402–03, 368 S.E.2d 268, 280 (1988)*; *Arndt v. Russillo, 231 Va. 328, 332, 343 S.E.2d 84, 86 (1986)*; *Van Collom v. Johnson, 228 Va. 103, 105–06, 319 S.E.2d 745, 746 (1984)*; *Kings Markets, Inc. v. Yeatts, 226 Va. 174, 181–82, 307 S.E.2d 249, 254 (1983)*; *Amusement Slides Corp. v. Lehmann, 217 Va. 815, 819, 232 S.E.2d 803, 805 (1977)*.

## Practice Commentary

A person's voluntary assumption of the risk of injury from a known danger operates as a complete bar to recovery for a defendant's alleged negligence in causing that injury. *Arndt, 231 Va. at 332, 343 S.E.2d at 86; Landes v. Arehart, 212 Va. 200, 202–03, 184 S.E.2d 127, 129 (1971)*. Application of the defense of assumption of the risk requires the use of a subjective standard, which addresses whether a particular plaintiff fully understood the nature and extent of a known danger and voluntarily exposed herself to that danger. *Hoar, 256 Va. at 390, 506 S.E.2d at 787*; *Young v. Lambert, 253 Va. 237, 241, 482 S.E.2d 823, 826 (1997)*.

***Separate Defenses.*** Virginia recognizes contributory negligence and assumption of the risk as separate and distinct defenses. *Amusement Slides Corp., 217 Va. at 815, 232 S.E.2d at 803*; *Stoner v. Robertson, 207 Va. 633, 637, 151 S.E.2d 363, 366–367 (1966)*. The two defenses are not mutually exclusive. *Budzinski v. Harris, 213 Va. 107, 110, 189 S.E.2d 372, 375 (1972)*. Accordingly, in cases where the evidence supports both contributory negligence and assumption of the risk, a defendant is entitled to instructions on both. *Meade v. Meade, 206 Va. 823, 829, 147 S.E.2d 171, 175 (1966)*; See also *Hoar, 256 Va. at 389–90, 506 S.E.2d at 786–87*.

***Rescue Doctrine.*** Under the rescue doctrine, the technical rules of contributory negligence and assumption of risk are not applied. Where the rescue doctrine applies, the rescuer can recover for his injuries where his actions are not rash and reckless. *Kimble v. Carey, 279 Va. 652, 661–62, 691 S.E.2d 790, 795 (2010)*. See the Case Authority and Practice Commentary for Instruction No. 7.020.

***Applicable Standard.*** Contributory negligence is measured by an objective standard, i.e. the actions of a reasonable person under the circumstances of the case, while assumption of the risk is measured by a subjective standard, i.e., the reasonableness of the actions of the plaintiff under the circumstances of the case.

*Waters, 246 Va. at 271, 435 S.E.2d at 381; Artrip, 240 Va. at 358, 397 S.E.2d at 823–824.* The essence of assumption of risk is venturousness, while the essence of contributory negligence is carelessness. *Arndt, 231 Va. at 332, 343 S.E.2d at 86; Kings Markets, 226 Va. at 181, 307 S.E.2d at 254.* The plaintiff's knowledge of the risk is essential when the defendant relies on an assumption of the risk defense. On the other hand, if a plaintiff knows or, in the exercise of ordinary care, should have known of the risk, he may be held contributorily negligent.

The risk is not voluntarily incurred where the defendant's negligence forces upon the plaintiff only one reasonable course of action. *Van Collom, 228 Va. at 106, 319 S.E.2d at 746.*

The Supreme Court has rejected the common law doctrine of "inherent risk" as a defense in a personal injury action. *Nelson, 265 Va. at 106, 574 S.E.2d at 281–82.*

In certain cases, assumption of the risk may be imposed by statute. For example, the Winter Sports Safety Act provides the rebuttable presumption that "[a] winter sports participant shall be presumed to have known the inherent risks of the winter sport in which he participates, to have fully appreciated the nature and extent of such risks, and to have voluntarily exposed himself to such risks, even if a particular risk was not specifically presented or stated to the participant by the operator." Va. Code Ann. § 8.01-227.19.

☞ ***PRACTICE POINTER:*** For a discussion of the "fireman's rule" and assumption of the risk, see *Goodwin v. Hare, 246 Va. 402, 403–405, 436 S.E.2d 605, 605–606 (1993); Benefiel v. Walker, 244 Va. 488, 490–496, 422 S.E.2d 773, 774–778 (1992); Philip Morris, Inc. 235 Va. at 405, 368 S.E.2d at 281–82; Commonwealth v. Millsaps, 232 Va. 502, 509–510, 352 S.E.2d 311, 311–313 (1987).*

☞ ***PRACTICE POINTER:*** Regarding persons rendering emergency care and assistance, including emergency obstetrical services, see Va. Code Ann. § 8.01-225.

☞ ***PRACTICE POINTER:*** Application of the choice of path doctrine can result in a finding of assumption of the risk. See *Gardner v. Phipps, 250 Va. 256, 259–260, 462 S.E.2d 91, 93 (1995)* (citing cases and discussing prior applications of doctrine).

### ***ALERTS:***

- Assumption of the risk is not a defense to a claim of breach of an implied warranty. *Wood v. Bass Pro Shops, Inc., 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995).*

- Assumption of risk by an employee suing a common carrier by railroad engaged in intrastate commerce shall not of itself bar recovery where injury or death resulted from defective or unsafe equipment or premises, or where the common carrier has violated safety statutes. Va. Code Ann. § 8.01-59.

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

## Instruction No. 6.110
## Assumption of the Risk: Burden of Proof

**Where the defendant claims assumption of the risk as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff fully appreciated the nature and the extent of a known danger; that the plaintiff voluntarily exposed himself to it; and that the plaintiff was injured as a result of the danger assumed. Assumption of the risk may be shown by the defendant's evidence or by the plaintiff's evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Thurmond v. Prince William Prof'l Baseball Club Inc., 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003)*; *Nelson v. Great Eastern Resort Mgmt., Inc., 265 Va. 98, 103–06, 574 S.E.2d 277, 280–81 (2003)*; *Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 250, 520 S.E.2d 164, 173 (1999)*; *Young v. Lambert, 253 Va. 237, 241, 482 S.E.2d 823, 825 (1997)*; *Virginia Elec. & Power Co. v. Winesett, 225 Va. 459, 470–71, 303 S.E.2d 868, 875–76 (1983).*

### PRACTICE COMMENTARY

In certain cases, assumption of the risk may be imposed by statute. For example, the Winter Sports Safety Act provides the rebuttable presumption that "[a] winter sports participant shall be presumed to have known the inherent risks of the winter sport in which he participates, to have fully appreciated the nature and extent of such risks, and to have voluntarily exposed himself to such risks, even if a particular risk was not specifically presented or stated to the participant by the operator." Va. Code Ann. § 8.01-227.19(A).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 19.02, 23.04, 25.02, 25.05, 26.02, 26.05, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-17, 4-20, 5-2, 5-3, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.11, 2.12, 3.2, 9.2, 11.7, 13.9, 13.13

Kent Sinclair, VIRGINIA REMEDIES §§ 19-3, 22-6, 25-1, 25-4, 25-5, 27-6, 28-6, 33-4

MICHIE'S JURISPRUDENCE, Negligence §§ 24 through 43

# Chapter 7

# SPECIAL NEGLIGENCE DOCTRINES



## Scope Note

**Instruction No. 7.000** **Sudden Emergency**
**Instruction No. 7.005** **Medical Emergency**
**Instruction No. 7.010** **Negligent Entrustment**
**Instruction No. 7.020** **Rescue**
**Instruction No. 7.030** **Last Clear Chance: Helpless Plaintiff**
**Instruction No. 7.040** **Last Clear Chance: Inattentive Plaintiff**
**Instruction No. 7.050** **Res Ipsa Loquitur**

# SCOPE NOTE

This chapter provides instructions on several doctrines that may arise in a negligence case: sudden emergency, medical emergency, negligent entrustment, rescue, last clear chance, and *res ipsa loquitur*. The instructions in this chapter concern special negligence doctrines, and they may need to be tailored to the specific facts of the case in order to properly assist the jury.

Instruction No. 7.000 Sudden Emergency. The defense of sudden emergency may be shown by the evidence refuting the plaintiff's claim, and is not an affirmative defense. *Daniels v. C. I. Whitten Transfer Co., 196 Va. 537, 545, 84 S.E.2d 528, 533 (1954).* For persons rendering emergency care and assistance, including emergency obstetrical services, see Va. Code Ann. § 8.01-225.

Instruction No. 7.005, Medical Emergency. A driver who is suddenly stricken with an illness he had no reason to anticipate and which renders it impossible for him to control the car is not negligent. *Hancock-Underwood v. Knight, 277 Va. 127, 138, 670 S.E.2d 720, 726–727 (2009).*

Instruction No. 7.010 is an issues and burden of proof instruction for cases involving negligent entrustment of a motor vehicle to an unfit driver. It also defines unfit driver, express permission, and implied permission.

For a discussion regarding entrustment of other instruments used to inflict injury, such as a firearm, see *Kingrey v. Hill, 245 Va. 76, 78, 425 S.E.2d 798, 799 (1993).*

Instruction No. 7.020 defines the doctrine of rescue and the effect on the reasonableness of a person's otherwise negligent conduct when confronted by imminent and serious danger not created by that person.

Instruction Nos. 7.030 and 7.040, covering last clear chance, and Instruction No. 7.020, Rescue, concern conduct that would otherwise constitute contributory negligence.

Instruction No. 7.050, Res Ipsa Loquitur, is proper only in special and infrequent circumstances. This instruction tells the jury that it may infer negligence, but need not do so, if it finds proof of other facts.

**Instruction No. 7.000**
**Sudden Emergency**

**The** [defendant; plaintiff] **contends that he was confronted with a sudden emergency. A sudden emergency is an event or a combination of circumstances that calls for immediate action without giving time for the deliberate exercise of judgment.**

**If you believe from the evidence that the** [defendant; plaintiff]**, without negligence on his part, was confronted with a sudden emergency and acted as a reasonable person would have acted under the circumstances of this case, he was not** [negligent; contributorily negligent]**.**

[Note: THIS INSTRUCTION SHOULD RARELY BE GIVEN. See *ALERTS* to Instruction No. 7.000.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hancock-Underwood v. Knight, 277 Va. 127, 137–38, 670 S.E.2d 720, 726 (2009)*; *Vahdat v. Holland, 274 Va. 417, 421, 649 S.E.2d 691, 694 (2007)*; *Herr v. Wheeler, 272 Va. 310, 315, 634 S.E.2d 317, 320 (2006)*; *Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 Va. 188, 193, 585 S.E.2d 557, 560 (2003)*; *Jones v. Ford Motor Co., 263 Va. 237, 262, 559 S.E.2d 592, 605 (2002)*; *Gardner v. Phipps, 250 Va. 256, 260, 462 S.E.2d 91, 94 (1995)*; *Bentley v. Felts, 248 Va. 117, 120, 445 S.E.2d 131, 133 (1994)*; *Garnot v. Johnson, 239 Va. 81, 86, 387 S.E.2d 473, 476 (1990)*; *Chodorov v. Eley, 239 Va. 528, 530, 391 S.E.2d 68, 70 (1990)*; *Carolina Coach Co. v. Starchia, 219 Va. 135, 141, 244 S.E.2d 788, 792 (1978)*; *Baxley v. Fischer, 204 Va. 792, 796, 134 S.E.2d 291, 294 (1964)*; *Williams v. Service, Inc., 199 Va. 326, 336–337, 99 S.E.2d 648, 655–56 (1957)*; *Daniels v. C.I. Whitten Transfer Co., 196 Va. 537, 545, 84 S.E.2d 528, 533 (1954)*.

### PRACTICE COMMENTARY

This instruction was discussed by the Supreme Court in *Vahdat. 274 Va. at 421–24, 649 S.E.2d at 693–95*.

Although the language of this instruction was approved in *Harrah v. Washington, 252 Va. 285, 294, 477 S.E.2d 281, 287 (1996)*, the Supreme Court held that when the driver has been previously exposed to the same circumstances, the situation is not unexpected, and the doctrine of sudden emergency cannot be used (e.g., fog on I-64 on Afton Mountain).

The doctrine of sudden emergency may be invoked either by the defendant as a defense to negligence, see *Virginia Transit Co. v. Durham, 190 Va. 979, 994, 59 S.E.2d 58, 66–67 (1950)*, or by the plaintiff as a defense to contributory negligence, see *Frazier v. Conner, 191 Va. 481, 485–86, 61 S.E.2d 880, 881–82 (1950)*.

The Supreme Court previously held that a sudden failure of brakes without any warning may lead to an "unavoidable accident" without any negligence on the part of the driver. In such a case, the driver was not liable. *Culberson v. McCloud, 227 Va. 249, 252–53, 315 S.E.2d 219, 221 (1984)*; *Simmons v. Adams, 202 Va. 926, 930, 121 S.E.2d 379, 382 (1961)*; *Rountree v. Rountree, 198 Va. 658, 663, 96 S.E.2d 113, 116 (1957)*. The Court has since abrogated the unavoidable accident doctrine, holding that the instruction should never be given and that it is error to do so. *Hancock-Underwood v. Knight, 277 Va. 127, 134–36, 670 S.E.2d 720, 724–25 (2009)*. Thus, the sudden failure of brakes, without other negligence, is adequately addressed by the other instructions usually given on negligence without an unavoidable accident instruction. A sudden emergency instruction is not warranted if a sudden brake failure concurs with other negligence. *Thibodeau v. Vandermark, 234 Va. 15, 18, 360 S.E.2d 171, 173 (1987)*.

☞ ***PRACTICE POINTER:*** The standard of conduct is stated in terms of what the ordinarily prudent person "would" do rather than "might" do. To use "might" is inappropriate, but is not reversible error, see *Baxley, 204 Va. at 797, 134 S.E.2d at*

*294–95*; *Virginia Transit Co., 190 Va. at 996, 59 S.E.2d at 66.*

☞ ***PRACTICE POINTER:*** The defense of sudden emergency may be shown by the evidence in refutation of the plaintiff's claim, and it is not an affirmative defense. *Vahdat, 274 Va. at 421, 649 S.E.2d at 694*, *Daniels, 196 Va. at 545, 84 S.E.2d at 533.* When the plaintiff has established a prima facie case of negligence, the defendant must, as a practical matter, present evidence to explain his conduct as something other than negligence, i.e., a result of sudden emergency. The plaintiff maintains the overall burden of proving, by the greater weight of the evidence, that defendant's conduct was negligent. *Vahdat, 274 Va. at 422, 649 S.E.2d at 694; Witt v. Merricks, 210 Va. 70, 72, 168 S.E.2d 517, 518 (1969), Daniels, 196 Va. at 546, 84 S.E.2d at 534.* There are, however, cases that require a defendant to produce evidence supporting the defense. *Pickett v. Cooper, 202 Va. 60, 63, 116 S.E.2d 48, 51 (1960).* The Supreme Court has noted that a plaintiff may request the court to grant an instruction regarding the defendant's duty to make a reasonable explanation for the defendant's actions. *Vahdat, 274 Va. at 422, 649 S.E.2d at 694*; *Daniels, 196 Va. at 546, 84 S.E.2d at 534.*

☞ ***PRACTICE POINTER:*** It is foreseeable and not unexpected that a car in a line of traffic will stop suddenly. See *Garnot* and *Chodorov.*

☞ ***PRACTICE POINTER:*** Regarding persons rendering emergency care and assistance, including emergency obstetrical services, see Va. Code Ann. § 8.01-225.

☞ ***PRACTICE POINTER:*** The occurrence of standing water on a roadway during a heavy rainstorm is one the driver of a vehicle must anticipate and exercise reasonable care to avoid, and such an occurrence is not an "unexpected happening" that would warrant giving a sudden emergency instruction. *Herr, 272 Va. at 317, 634 S.E.2d at 321.*

☞ ***PRACTICE POINTER:*** Evidence that other drivers were able to proceed without incident for some time under adverse conditions does not warrant a sudden emergency instruction just because there is evidence that the proponent of the instruction lost control of his vehicle under the same adverse conditions. *Herr, 272 Va. at 318, 634 S.E.2d at 321.*

### ***ALERTS:***

- A sudden emergency is an "unexpected happening, an unforeseen occurrence or condition," and "the grant of a sudden emergency instruction is rarely appropriate." *Jones, 263 Va. at 262–263, 559 S.E.2d at 605*; see also *Vahdat, 274 Va. at 421, 649 S.E.2d at 693 n.2.*

- The doctrine of sudden emergency may not be invoked by one who creates the emergency by his own negligence. *Lendvay v. Sobrito, 211 Va. 548, 550, 178 S.E.2d 532, 534 (1971), Bloxom v. McCoy, 178 Va. 343, 349, 17 S.E.2d 401, 403 (1941).* See also *Howell v. Cahoon, 236 Va. 3, 5–7, 372 S.E.2d 363, 364–65 (1988), Cowles v. Zahn, 206 Va. 743, 746, 146 S.E.2d 200, 203 (1966)*; *Baxley, 204 Va. at 796, 134 S.E.2d at 294.* One who "contributes to" the emergency by his own

negligence may not invoke the doctrine of sudden emergency to explain his conduct. See *Thibodeau v. Vandermark, 234 Va. 15, 18, 360 S.E.2d 171, 173 (1987).*

- The sudden emergency doctrine does not apply where a defendant is incapacitated by a medical emergency that he had no reason to anticipate. In such cases, counsel may consider Instruction No. 7.005, Medical Emegency. See *Hancock-Underwood v. Knight, 277 Va. 127, 137–38, 670 S.E.2d 720, 726 (2009)*, and Instruction No. 7.005.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 3.8, 3.9, 5.1, 21.9

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02

Kent Sinclair, VIRGINIA REMEDIES § 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 56, 72, 91; Negligence §§ 9, 32, 33, 59, 64

## Instruction No. 7.005
## Medical Emergency

**The** [defendant; plaintiff] **contends that he was confronted with a medical emergency. A medical emergency occurs when the** [defendant; plaintiff] **is suddenly stricken by an illness that he had no reason to anticipate and which renders it impossible for him to control his** [automobile; (name of other vehicle); (name of other machine)]**.**

**If you believe from the evidence that the** [defendant; plaintiff] **was confronted by a medical emergency, then he was not negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hancock-Underwood v. Knight, 277 Va. 127, 138, 670 S.E.2d 720, 726–27 (2009)*; *Witt v. Merricks, 210 Va. 70, 72, 168 S.E.2d 517, 518 (1969)*; *Brinser v. Young, 208 Va. 525, 527, 158 S.E.2d 759, 761 (1968).*

### PRACTICE COMMENTARY

None.

***PRACTICE POINTER:*** None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 3.8, 3.9, 5.1, 21.9

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02

Kent Sinclair, VIRGINIA REMEDIES § 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 56, 72, 91; Negligence §§ 9, 32, 33, 59, 64

## Instruction No. 7.010
## Negligent Entrustment

**The plaintiff contends that the defendant is liable because he permitted his vehicle to be used by an unfit driver whose negligence, as a result of the unfitness, caused the accident. An unfit driver is a person who, because of his** [age; inexperience; physical condition; mental condition; drug/alcohol impairment]**, is likely to use a motor vehicle in a manner involving unreasonable risk of harm to others. Plaintiff must prove by the greater weight of the evidence that:**

(1) **defendant expressly or impliedly permitted** (name of driver) **to drive his vehicle; and**

(2) (name of driver) **was an unfit driver; and**

(3) **defendant knew, or should have known, that** (name of driver) **was an unfit driver; and**

(4) (name of driver) **was negligent as a result of the unfitness; and**

(5) (name of driver)**'s negligence was a proximate cause of plaintiff's injuries.**

**Permission is express when it is given directly. Permission is implied when it is gathered from the circumstances, general language, or conduct of the parties.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Turner v. Lotts, 244 Va. 554, 557, 422 S.E.2d 765, 767 (1992)*; *Hack v. Nester, 241 Va. 499, 503–04, 404 S.E.2d 42, 43 (1990)*; *Denby v. Davis, 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972)*; *Laughlin v. Rose, 200 Va. 127, 132, 104 S.E.2d 782, 786 (1958).*

### PRACTICE COMMENTARY

Va. Code Ann. § 8.01-64 imposes liability on the owner of a motor vehicle who causes or knowingly allows a minor under sixteen, who does not hold a valid driver's permit, to operate the owner's motor vehicle on a highway. Va. Code Ann. § 46.2-349 provides that a person owning or controlling a motor vehicle shall not allow that vehicle to be driven by any person who has no legal right to do so. Although it is negligence per se to knowingly entrust a motor vehicle to an unlicensed driver, there can be no recovery for negligent entrustment unless the reason for the driver's disqualification from securing a license was a proximate cause of the collision. *Hack, 241 Va. at 503–504, 404 S.E.2d at 43*; *Laughlin, 200 Va. at 132–133, 104 S.E.2d at 786.*

Va. Code Ann. § 8.01-65 provides a valid defense for the owner of a negligently operated vehicle to prove that it was being driven or used without his knowledge or consent. The burden of proof is on such owner.

☞ ***PRACTICE POINTER:*** For a discussion regarding entrustment of other instruments used to inflict injury, such as a firearm, see *Kingrey, 245 Va. at 79, 425 S.E.2d at 799.*

### *ALERTS:*

- The Supreme Court expressly rejected an argument extending motor vehicle negligent entrustment concepts to parental liability for the failure to control a minor child's criminal behavior, indicating that to be a legislative choice. *Thompson v. Skate America, Inc., 261 Va. 121, 131–32, 540 S.E.2d 123, 128–29 (2001).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 3.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.02, 26.10

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4; 33-4

MICHIE'S JURISPRUDENCE, Automobiles § 47; Negligence § 44

**Instruction No. 7.020**
**Rescue**

**The plaintiff contends that** [he was not contributorily negligent; he did not assume the risk] **when he exposed himself voluntarily to danger because he was attempting to rescue** (name of person)**. A plaintiff who risks injury while attempting to rescue someone** [is not contributorily negligent; did not assume the risk] **if you believe from all the evidence:**

**(1) that** (name of person) **was in imminent and serious danger;**

**(2) that plaintiff was injured after the rescue attempt began;**

**(3) that plaintiff did not create the danger; and**

**(4) that the plaintiff did not rashly and recklessly disregard all considerations for his own safety in attempting to rescue** (name of person)**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Kimble v. Carey, 279 Va. 652, 660–62, 691 S.E.2d 790, 794–95 (2010)*; *Lassiter v. Warinner, 235 Va. 274, 276–77, 368 S.E.2d 258, 259–60 (1988)*; *Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 709, 133 S.E.2d 559, 563 (1963)*; *Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 160–61, 63 S.E.2d 750, 756–57 (1951)*; *Wright v. Atlantic Coast Line R.R., 110 Va. 670, 673–74, 66 S.E. 848, 849 (1910)*.

### PRACTICE COMMENTARY

The usual situation in which the rescue doctrine will be applied is one where a third-party negligently created the peril. *Kimble, 279 Va. at 659, 691 S.E.2d at 794.* The doctrine may be applied, however, when the defendant did not create the peril but had a duty to prevent harm to those in danger. See, e.g., *Southern Ry. Co. v. Baptist, 114 Va. 723, 726–28, 77 S.E. 477, 479 (1913).* See also *Commonwealth v. Millsaps, 232 Va. 502, 508, 352 S.E.2d 311, 314 (1987)* (rescue doctrine did not apply to permit the Commonwealth to recover damages to state property arising from automobile accident caused by State Trooper's attempt to "contain" a suspect's vehicle via a "rolling roadblock" during a high-speed chase on an interstate highway, as it does not cover rescue efforts directed toward potential but unperceived victims).

☞ ***PRACTICE POINTER:*** See Va. Code Ann. § 8.01-225 for the statutory liability of persons who render emergency care and assistance, including emergency obstetrical services.

### *ALERTS:*

- Instruction 7.020 states the rescue doctrine as most commonly applied, where negligence by a third-party placed the victim in imminent peril and the rescuer is injured by the same third-party in the rescue attempt. *Kimble, 279 Va. at 659, 691 S.E.2d at 794*; *Lassiter, 235 Va. at 277, 368 S.E.2d at 260.*

- There is another application of the rescue doctrine where the victim himself may be liable to the rescuer. In this case, the victim was not negligent in creating the peril, but is guilty of negligently causing injury to the rescuer after the rescuer has begun the attempt to rescue. *Lassiter, 235 Va. at 281, 368 S.E.2d at 262.*

- There is a third application of the rescue doctrine approved by the Supreme Court. Here, the victim may be liable to the rescuer even though the rescuer's injuries were inflicted by a third-party during the rescue attempt. The liability of the victim is based on the victim's negligence in creating his own peril and proximately causing the plaintiff's injuries inflicted by the third-party. *Kimble, 279 Va. at 660, 368 S.E.2d at 794.*

- If there is no evidence that the plaintiff created the danger, this instruction must be altered by deleting the words "that plaintiff did not create the danger." See *Lassiter, 235 Va. at 281, 368 S.E.2d at 262.*

- The doctrine of rescue is not a theory of recovery. If the act of the defendant is not tortious, an attempted rescue creates no new, independent right of liability. *Lassiter, 235 Va. at 280, 368 S.E.2d at 261–62.* It is an exception to the rule that one who is aware of danger and fails to exercise ordinary care to avoid injury from it is contributorily negligent. *Andrews, 192 Va. at 160, 63 S.E.2d at 756.*

- The rescue doctrine does not apply in circumstances where the rescuer's efforts are not directed at any specific individual perceived to be in peril, but are instead intended to protect unknown persons who are likely to encounter the peril soon after it arises. *Millsaps, 232 Va. at 508, 352 S.E.2d at 314.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 5.1

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Kent Sinclair, VIRGINIA REMEDIES § 25-5

MICHIE'S JURISPRUDENCE, Negligence § 33

**Instruction No. 7.030**
**Last Clear Chance: Helpless Plaintiff**

**Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:**

**(1) the plaintiff negligently placed himself in a situation of peril from which he was physically unable to remove himself; and**

**(2) the defendant saw, or should have seen, the plaintiff and realized, or should have realized, his peril; and**

**(3) thereafter, the defendant could have avoided the accident by using ordinary care.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Coutlakis v. CSX, 293 Va. 212, 216–20; 796 S.E.2d 556, 559–60 (2017)*; *Williams v. Harrison, 255 Va. 272, 276, 497 S.E.2d 467, 470 (1998)*; *Pack v. Doe, 236 Va. 323, 328–29, 374 S.E.2d 22, 24–25 (1988)*; *Simmers v. DePoy, 212 Va. 447, 451–52, 184 S.E.2d 776, 780 (1971)*; *Smith v. Spradlin, 204 Va. 509, 512, 132 S.E.2d 455, 457 (1963)*; *Greear v. Noland Co., 197 Va. 233, 237–39, 89 S.E.2d 49, 52–53 (1955).*

### PRACTICE COMMENTARY

The last clear chance doctrine means that one of the litigants had a last clear chance to avoid inflicting the damage or injury, notwithstanding the fact that the other litigant had previously, by his own negligence, placed himself in a situation of peril. *Eisenhower v. Jeter, 205 Va. 159, 163, 135 S.E.2d 786, 788–89 (1964).* There are two types of plaintiff who may avail themselves of the last clear chance doctrine: (1) the helpless plaintiff who negligently placed himself in a situation of peril from which he is physically unable to escape; and (2) an inattentive plaintiff who negligently placed himself in a situation of peril from which he is physically able to escape, but is unconscious of his peril. Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to escape, the defendant is liable if he saw, or should have seen, the injured person in time to avert the accident by using reasonable care. Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to escape, but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care. *Greear, 197 Va. at 238–39, 89 S.E.2d at 53.*

The continuing nature of a plaintiff's contributory negligence does not automatically bar the application of the last clear chance doctrine. Once a plaintiff's contributory negligence is established, rather, the application of the doctrine turns first on whether the defendant was also negligent and then on a determination of which party, if any, had the last clear chance to avoid the accident. *Coutlakis, 293 Va. at 222, 796 S.E.2d at 562.*

☞ ***PRACTICE POINTER:*** See also Instruction No. 7.040, Last Clear Chance: Inattentive Plaintiff.

### *ALERTS:*

- It is error to give the "last clear chance" instruction for the helpless plaintiff unless there is evidence that the physical incapacity of the plaintiff results from a non-negligent, non-intentional natural cause. Voluntary intoxication is not "physical incapacity" within the last clear chance doctrine. *Pack, 236 Va. at 330–31, 374 S.E.2d at 25–26.* Whether a similar exception would apply if a victim's inattentiveness was produced by voluntary obstruction of his senses is undecided.

- If the opportunity to avoid the accident is as available to the plaintiff as to the defendant, then last clear chance does not supersede contributory negligence.

*Williams, 255 Va. at 276–77, 447 S.E.2d at 470.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 5.1

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Kent Sinclair, VIRGINIA REMEDIES §§ 18-4, 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 72, 88; Carriers § 89; Negligence §§ 34 through 40, 54, 63, 71, 73, 74; Railroads §§ 66, 98, 99, 100, 131, 133, 135; Street Railroads §§ 16, 19, 25

**Instruction No. 7.040**
**Last Clear Chance: Inattentive Plaintiff**

**Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:**

**(1) the plaintiff negligently placed himself in a situation of peril; and**

**(2) he was physically able to remove himself from the situation, but he was unaware of his peril; and**

**(3) the defendant actually saw the plaintiff and realized, or should have realized, his peril; and**

**(4) therefore, the defendant could have avoided the accident by using ordinary care.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Coutlakis v. CSX, 293 Va. 212, 217–20, 796 S.E.2d 556, 559–60 (2017)*; *Williams v. Harrison, 255 Va. 272, 276, 497 S.E.2d 467, 469 (1998)*; *Simmers v. DePoy, 212 Va. 447, 451–52, 184 S.E.2d 776, 780 (1971)*; *Smith v. Spradlin, 204 Va. 509, 512, 132 S.E.2d 455, 457 (1963)*; *Greear v. Noland Co., 197 Va. 233, 237–39, 89 S.E.2d 49, 52–53 (1955)*.

### PRACTICE COMMENTARY

The last clear chance doctrine means that one of the litigants had a last clear chance to avoid inflicting the damage or injury, notwithstanding the fact that the other litigant had previously, by his own negligence, placed himself in a situation of peril. *Eisenhower v. Jeter, 205 Va. 159, 163, 135 S.E.2d 786, 788–89 (1964)*. There are two types of plaintiff who may avail themselves of the last clear chance doctrine: (1) the helpless plaintiff who negligently placed himself in a situation of peril from which he is physically unable to escape; and (2) an inattentive plaintiff who negligently placed himself in a situation of peril from which he is physically able to escape, but is unconscious of his peril. Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to escape, the defendant is liable if he saw, or should have seen, the injured person in time to avert the accident by using reasonable care. Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to escape, but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care. *Greear, 197 Va. at 238–39, 89 S.E.2d at 53*.

The continuing nature of a plaintiff's contributory negligence does not automatically bar the application of the last clear chance doctrine. Rather, once a plaintiff's contributory negligence is established, the application of the doctrine turns first on whether the defendant was also negligent and then on a determination of which party, if any, had the last clear chance to avoid the accident. *Coutlakis, 293 Va. at 222, 796 S.E.2d at 562*.

☞ ***PRACTICE POINTER:*** See also Instruction No. 7.030, Last Clear Chance: Helpless Plaintiff.

### *ALERTS:*

- If the opportunity to avoid the accident is as available to the plaintiff as to the defendant, then last clear chance does not supersede contributory negligence. *Williams, 255 Va. at 276–277, 447 S.E.2d at 470*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 5.1

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Kent Sinclair, VIRGINIA REMEDIES §§ 18-4, 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 72, 88; Carriers § 89; Negligence §§ 34 through 40,

54, 63, 71, 73, 74; Railroads §§ 66, 98, 99, 100, 131, 133, 135; Street Railroads §§ 16, 19, 25

**Instruction No. 7.050**
**Res Ipsa Loquitur**

**Where the plaintiff has proved by the greater weight of the evidence that:**

**(1) an accident has occurred which normally would not have occurred if the defendant had used ordinary care; and**

**(2) the means or instrumentality causing the accident was under the exclusive control of the defendant; and**

**(3) the defendant had, or should have had, exclusive knowledge** [of the way the instrumentality was used; how the accident occurred]**;**

**you may, but are not required to, decide that the defendant was negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lewis v. Carpenter Co., 252 Va. 296, 300, 477 S.E.2d 492, 494 (1996)*; *Cooper v. Horn, 248 Va. 417, 421–22, 448 S.E.2d 403, 405–06 (1994)*; *Easterling v. Walton, 208 Va. 214, 216–217, 156 S.E.2d 787, 789–90 (1967)*; *Danville Community Hosp. v. Thompson, 186 Va. 746, 758–60, 43 S.E.2d 882, 886–88 (1947).*

### PRACTICE COMMENTARY

Proof of facts entitling the plaintiff to use the doctrine allows the jury to infer negligence. The jury may, but need not, infer negligence from the proof of the facts necessary to allow its use. *Easterling, 208 Va. at 217, 156 S.E.2d at 790.* Neither the burden of proof nor the burden of producing evidence is shifted to the defendant. The legal effect of the doctrine is to allow the jury to decide the question of negligence even though there is no direct proof that the defendant was negligent.

☞ ***PRACTICE POINTER:*** The bracketed language in subparagraph (3) is the more familiar statement of the doctrine; it should be used when appropriate. The language which precedes the brackets was chosen for this instruction because it is the more recent formulation of the doctrine. See *id.*

### *ALERTS:*

- *Res ipsa loquitur* is an evidentiary presumption that cannot be applied when evidence is available to explain the accident. The doctrine rests upon the assumption that the instrumentality which caused the injury or damage was under the exclusive possession or management of the defendant; the accident must be of such nature and character as does not ordinarily occur if due care is used; and the evidence regarding the true cause of the accident is accessible to the defendant and inaccessible to the person injured. *Lewis, 252 Va. at 300, 477 S.E.2d at 494*; *Cooper, 248 Va. at 421–22, 448 S.E.2d at 405–06*; *Logan v. Montgomery Ward & Co., 216 Va. 425, 429, 219 S.E.2d 685, 688 (1975).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 3.7, 19.3, 20.5

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 29.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

Kent Sinclair, VIRGINIA REMEDIES §§ 25-3; 27-1; 28-8

MICHIE'S JURISPRUDENCE, Automobiles § 85; Negligence § 55

# Chapter 8

# AGENCY, EMPLOYMENT AND SIMILAR RELATIONSHIPS

## Scope Note


**Instruction No. 8.000** **Definition of Employer and Employee**

**Instruction No. 8.010** **Employer's Liability for Employee's Negligence**

**Instruction No. 8.020** **Issues and Allocation of Burden of Proof**

**Instruction No. 8.030** **Scope of Employment—Presumption and Burden of Production**

**Instruction No. 8.040** **Scope of Employment**

**Instruction No. 8.050** **Scope of Employment: Multiple Motives**

**Instruction No. 8.060** **Scope of Employment: Intentional Acts**

**Instruction No. 8.070** **Employer's Liability for Acts of Employee's Assistant**

**Instruction No. 8.080** **Special Employer Liable for Acts of Borrowed Employee**

**Instruction No. 8.100** **Definition of Independent Contractor**

**Instruction No. 8.110** **Principal Not Liable for Acts of Independent Contractor**

**Instruction No. 8.120** **Definition of Business Joint Venture: Liability of Co-Venturers**

**Instruction No. 8.130** **Definition of Non-Business Joint Enterprise: Liability of Participants**

**Instruction No. 8.140** **Joint Enterprise: Right of Control**

**Instruction No. 8.150** **Definition of Partnership: Liability of Partners**

# SCOPE NOTE

The instructions in this section deal with the vicarious liability of a party for the acts of another. Only tort liability is treated here; the business aspects of agency are covered under particular topics such as Chapter 42, Attorney and Client; Chapter 43, Brokers; and Chapter 47, Insurance. These instructions are divided into three areas: employer and employee; independent contractors; and joint undertakings. The last area includes joint ventures, joint enterprises, and partnerships.

The words "employer" and "employee" are used throughout these instructions; "master" and "servant" or "principal" and "agent" are synonymous with "employer" and "employee" and can be substituted freely. *Ideal Steam Laundry v. Williams, 153 Va. 176, 179, 149 S.E. 479, 480 (1929).* Employer and employee are more consistent with modern usage. "Principal" and "agent" have distinct meanings in the area of contract law. *Virginia Iron, Coal & Coke Co. v. Odle's Adm'r, 128 Va. 280, 287–88, 105 S.E. 107, 109 (1920), abrogated on other grounds by McDonald v. Hampton Training Sch. for Nurses, 254 Va. 79, 82–86, 486 S.E.2d 299, 301–02 (1997)*; see also *Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P., 263 Va. 377, 385–86, 560 S.E.2d 246, 249–51 (2002).*

The term "negligence" is used throughout the instructions even though an "intentional act" also creates liability for the employer. *See* Instruction No. 8.060. You may substitute intentional act or a similar term for "negligence" whenever it is appropriate.

Instruction No. 8.000 defines "employer" and "employee." Control is the key element. Instruction No. 8.010 states the basic principle of vicarious liability: the employer is liable for the acts of the employee within the scope of his employment. Instruction No. 8.020 is a burden of proof instruction; a plaintiff must prove the elements of a negligence case—duty, breach, causation, and damages—as well as the employment and scope of employment of the tortfeasor.

Several presumptions exist in this area that make the plaintiff's proof easier. If a motor vehicle is involved, an allegation of ownership in the pleadings is proof of ownership unless specifically denied by affidavit. Va. Code Ann. § 8.01-279(B). But see Va. Sup. Ct. R. 1:10 (affidavit requirement can be waived if there is no objection to the absence of an affidavit within seven days of filing the relevant pleading).

Instruction No. 8.030 deals with the presumption that an employee was acting within the scope of his employment. Instruction No. 8.040 defines "scope of employment." This instruction should be given when there is a jury issue on scope of employment—that is, when the putative employer has put on sufficient evidence of activity outside the scope of employment that the jury must decide whether to believe that evidence or to rely on the presumption and believe plaintiff's evidence. Instruction No. 8.050 covers instances where the employee's actions are in furtherance of the employer's interests and also motivated by personal gain or the benefit of a third person. Instruction No. 8.060 instructs the jury that intentional wrongs may be within the scope of employment.

The last two employer-employee instructions cover the employer's liability for the actions of persons other than his immediate employee. Instruction No. 8.070 states that the employer is liable for the negligent acts of his employee's employees if having employees was within the scope of his employee's employment. Instruction No. 8.080

states the employer's liability for a borrowed employee.

There are two instructions for independent contractors. Instruction No. 8.100 defines "independent contractor." Instruction No. 8.110 states the general rule regarding liability for actions of an independent contractor and the limitations on that rule.

There are four instructions on joint undertakings. The rule of liability is the same for joint ventures, joint enterprises, and partnerships: each person involved in a joint undertaking is liable for the acts of any co-participant. There has never been a rigorous consistency in the use of the terms "joint enterprise" and "joint venture." The Committee chose to use the former in non-business settings and the latter in business settings. Thus, throughout these instructions the differences among the types of joint undertakings are these: a joint enterprise is a non-business undertaking while a joint venture and a partnership are created for some business purpose; a joint venture differs from a partnership in that the partnership involves common ownership of the business while a joint venture does not. The definition and the rule of liability for each joint undertaking are stated in Instruction No. 8.120 for a joint venture, in Instruction No. 8.130 for a joint enterprise, and in Instruction No. 8.150 for a partnership. Instruction No. 8.140 states the rule that the right to control in a joint undertaking must result from the nature of the undertaking and not from a social act of courtesy.

## Instruction No. 8.000
## Definition of Employer and Employee

**An employer is a person or legal entity with the power or right to control the means and methods of performance by which another person performs the employer's work.**

**An employee is the person who is subject to the power or right of an employer to control the means and methods of performing the work.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 687, 594 S.E.2d 908, 911 (2004)*; *McDonald v. Hampton Training Sch. for Nurses, 254 Va. 79, 81, 486 S.E.2d 299, 301–02 (1997)*; *Hadeed v. Medic-24, Ltd., 237 Va. 277, 287–88, 377 S.E.2d 589, 594–95 (1989)*; *Whitfield v. Whittaker Mem'l Hosp., 210 Va. 176, 182, 169 S.E.2d 563, 567 (1969)*; *Ashworth v. Baker, 197 Va. 582, 586–87, 90 S.E.2d 860, 864 (1956).*

### PRACTICE COMMENTARY

"Principal" and "agent" may be substituted for the words "employer" and "employee" in this and all subsequent instructions. Although they are archaic, the words "master" and "servant" may also be used.

"Person" includes business entities as well as natural people. *See* Va. Code Ann. § 8.01-2(5).

The factors to be considered to determine whether an individual is an employee or independent contractor are: (1) selection and engagement of the servant; (2) payment of compensation; (3) power of dismissal; and (4) power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative. *Hadeed, 237 Va. at 288, 377 S.E.2d at 594–95.*

The fourth factor "refers to control over the means and methods of performing the work. It is immaterial whether the employer exercises the control; the test is whether the employer has the power to exercise such control." *McDonald, 254 Va. at 81, 486 S.E.2d at 301.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.010
## Employer's Liability for Employee's Negligence

**An employer is liable for all damages proximately caused by the negligence of his employee while acting within the scope of that person's employment.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 844, 832 S.E.2d 15, 22–23 (2019)*; *A.H. v. Church of God in Christ, Inc., 297 Va. 604, 621–23, 831 S.E.2d 460, 470–71 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 335–36, 819 S.E.2d 809, 819 (2018)*; *Gina Chin & Assocs., Inc. v. First Union Bank, 260 Va. 533, 540–42, 537 S.E.2d 573, 576–77 (2000)*; *McNeill v. Spindler, 191 Va. 685, 694–95, 62 S.E.2d 13, 17–18 (1950)*.

### PRACTICE COMMENTARY

The employer may be liable for the intentional acts of his employee. *See Our Lady of Peace, Inc., 297 Va. at 844, 832 S.E.2d at 22*; *Doe v. Baker, 299 Va. 628, 649–51, 857 S.E.2d 573, 586–87 (2021)* (the determination of whether an employee was or was not acting within the scope of his employment is fact specific). *See* Instruction Nos. 8.030, Scope of Employment—Presumption and Burden of Production, and 8.060, Scope of Employment: Intentional Acts.

An employee's former supervisor or manager may be jointly liable with the employer for the wrongful termination of the employee. *VanBuren v. Grubb, 284 Va. 584, 592–93, 733 S.E.2d 919, 923–24 (2012)*.

Under Virginia law, a plaintiff pursuing relief against an employer on a theory of *respondeat superior* is not required to file an action against the employee alleging the employee was negligent. *Hughes v. Doe, 273 Va. 45, 48, 639 S.E.2d 302, 304 (2007)*.

### *ALERTS:*

Where the defendant contends that he is not liable because the alleged tortfeasor was an independent contractor rather than an employee, the court should instruct on the definition of an independent contractor. *See* Instruction No. 8.100, Definition of Independent Contractor.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.020
## Issues and Allocation of Burden of Proof

**In order to recover against** (name of employer), **the plaintiff has the burden of proving by the greater weight of the evidence that** (name of employee) **was the employee of** (name of employer), **that** (name of employee) **was negligent while acting within the scope of his employment, and that this negligence proximately caused damage to the plaintiff.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 842–44, 832 S.E.2d 15, 21–23 (2019)*; *A.H. v. Church of God in Christ, Inc., 297 Va. 604, 633–34, 831 S.E.2d 460, 477 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 332–33, 819 S.E.2d 809, 817–18 (2018)*; *Gina Chin & Assocs., Inc. v. First Union Bank, 260 Va. 533, 542, 537 S.E.2d 573, 577–78 (2000)*; *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 49–50, 453 S.E.2d 261, 268 (1995)*; *Smith v. Landmark Commc'ns, Inc., 246 Va. 149, 151–52, 431 S.E.2d 306, 307–08 (1993)*; *Sayles v. Piccadilly Cafeterias, Inc., 242 Va. 328, 332, 410 S.E.2d 632, 634 (1991)*; *Master Auto Serv. Corp. v. Bowden, 179 Va. 507, 510, 19 S.E.2d 679, 680 (1942)*.

## Practice Commentary

This instruction states that the burden of proof is upon the plaintiff to prove the elements of his case. The instruction is based upon *Master Auto Serv. Corp., 179 Va. at 510, 19 S.E.2d at 680*, where the Court stated:

> To fasten responsibility upon an employer for a tort committed by an employee under the doctrine of *respondeat superior*, a plaintiff must not only establish the relation of master and servant between the parties, but he must prove (1) that at the time of the commission of the tort the servant was about his master's business, and (2) that the servant was acting within the scope of his employment.

A plaintiff seeking to recover damages from an employer for injuries caused by an employee has the burden to establish that the master-servant relationship existed at the time of the injuries. *Sayles, 242 Va. at 332, 410 S.E.2d at 634*.

***Burdens of Proof and Production.*** Three cases explain the burden of proof and production, *Our Lady of Peace, Inc., 297 Va. at 848, 832 S.E.2d at 25*; *A.H. v. Church of God in Christ, Inc., 297 Va. at 633–34, 831 S.E.2d at 477*; *Parker, 296 Va. at 332–33, 819 S.E.2d at 817–18*.

The burden of proof primarily means the duty resting on one party or the other, usually the party having the affirmative duty, to establish by a preponderance of the evidence a proposition essential to the maintenance of the action. 7B M.J., *Evidence* § 29, at n.13 (2004). "This burden of proof is not to be confused with the burden of producing evidence. That burden frequently passes from party to party during the progress of a trial, but the necessity of proving his case always rests upon the plaintiff and never shifts." *Hall v. Hall, 181 Va. 67, 80, 23 S.E.2d 810, 815 (1943). See also Westmoreland Coal Co. v. Campbell, 7 Va. App. 217, 222, 372 S.E.2d 411, 415 (1988)*. Thus, despite cases stating that "the burden of proof" shifts to the defendant once the employment relationship is established, it is actually the burden of producing evidence that shifts. See Instruction No. 8.030, Scope of

Employment—Presumption and Burden of Production, and accompanying Comment.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.030
## Scope of Employment—Presumption and Burden of Production

**If you find by the greater weight of the evidence that** (name of employee) **was the employee of** (name of employer), **the defendant, you may presume that** (name of employee) **was acting within the scope of employment. Once an employer-employee relationship has been established, the burden is on the** (name of employer), **the defendant, to present evidence that the** (name of employee) **was not acting within the scope of employment when the act was committed.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Baker, 299 Va. 628, 647, 857 S.E.2d 573, 585 (2021)*; *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 848, 832 S.E.2d 15, 25 (2019)*; *A.H. v. Church of God in Christ, Inc., 297 Va. 604, 633–34, 831 S.E.2d 460, 477 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 332–33, 819 S.E.2d 809, 817–18 (2018)*; *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 43–44, 453 S.E.2d 261, 265 (1995)*; *Kensington Assocs. v. West, 234 Va. 430, 432–33, 362 S.E.2d 900, 901 (1987)*; *United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Humphreys, 203 Va. 781, 787, 127 S.E.2d 98, 102 (1962)*; *McNeill v. Spindler, 191 Va. 685, 695, 62 S.E.2d 13, 18 (1950)*.

### PRACTICE COMMENTARY

The function of the presumption involved here is to allow the plaintiff to establish a case that will survive a motion to strike simply by proving that the defendant employed the one who allegedly committed the wrong. Usually, the issue of employment will not be contested. The presumption does not relieve the plaintiff of his burden of proof; it shifts the burden of producing evidence to the defendant.

### *ALERTS:*

- This instruction should be given only when (1) the employment relationship is in question and (2) the presumption arising from that relationship has not been rebutted.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.040
## Scope of Employment

**In reaching your decision whether** (name of employee) **was acting within the scope of his employment, you must determine whether he was acting within the ordinary course of such business. In making that determination, you may consider any of the following: (1) whether the act was expressly or impliedly directed by the employer; (2) whether the act was in the ordinary course of business or naturally incident to the employer's business; (3) whether the act was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest; and (4) whether the act was performed from some impulse or emotion that was the natural consequence of an attempt to do the employer's business.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 844–45, 832 S.E.2d 15, 23 (2019)*; *A.H. v. Church of God in Christ, Inc., 297 Va. 604, 633–34, 831 S.E.2d 460, 477 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 336–41, 819 S.E.2d 809, 820–22 (2018)*; *Gina Chin & Assocs., Inc. v. First Union Bank, 260 Va. 533, 541, 537 S.E.2d 573, 577 (2000)*; *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 43–46, 453 S.E.2d 261, 265–66 (1995)*; *Kensington Assocs. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987)*; *Tri-State Coach Corp. v. Walsh, 188 Va. 299, 306, 49 S.E.2d 363, 366 (1948)*; *Davis v. Merrill, 133 Va. 69, 75–77, 112 S.E. 628, 630–31 (1922).*

## PRACTICE COMMENTARY

This instruction lists some of the factors which the jury may consider in determining whether an employee was acting within the scope of his employment when he committed the act complained of. This is normally a question of fact for the jury, but where "the undisputed evidence shows that an employee's deviation from his employer's business is slight and not unusual, or, on the other hand, great and unusual," the court should "determine, as a matter of law, whether the employee was acting in the scope of his employment. When, however, the evidence places the case between these two extremes, the issue is for a jury." *Kensington, 234 Va. at 433, 362 S.E.2d at 902.*

"[T]he motive of the employee in committing the act complained of is not determinative of whether it took place within the scope of the employment relationship . . . . the issue is whether the service itself, in which the tortious act was done, was within the ordinary course of his employment." *Gina Chin, 260 Va. at 543, 537 S.E.2d at 578*; *Commercial Bus. Sys., 249 Va. at 45, 453 S.E.2d at 266*; *Davis, 133 Va. at 78, 112 S.E. at 631.* While not always determinative, standing alone, the motive of the employee in committing the act complained of is a relevant 'factor' in the scope-of-employment issue. *Our Lady of Peace, Inc., 297 Va. at 845–46, 832 S.E.2d at 23–24*; *Parker, 296 Va. at 340–41, 819 S.E.2d at 821–22.*

## *ALERTS:*

- The test for determining whether an accidental injury "arose out of and in the course of the employment" under the Virginia Workers' Compensation Act, Va. Code Ann. § 65.2-101, "is not the same as the test for determining whether a servant acted within the scope of his employment under the doctrine of *respondeat superior*." *Sayles v. Piccadilly Cafeterias, Inc., 242 Va. 328, 331, 410 S.E.2d 632, 634 (1991).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.050
## Scope of Employment: Multiple Motives

**The employer is responsible for his employee's actions if the employee was trying to some extent to serve the employer's business even though the primary motive of the employee was to benefit himself or a third person.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 845–46 832 S.E.2d 15, 23–24 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 340–41, 819 S.E.2d 809, 821–22 (2018)*; *Smith v. Landmark Commc'ns, Inc., 246 Va. 149, 151–52, 431 S.E.2d 306, 307–08 (1993)*; *Bryant v. Bare, 192 Va. 238, 246, 64 S.E.2d 741, 746 (1951)*; *Kidd v. De Witt, 128 Va. 438, 444–45, 105 S.E. 124, 126 (1920)*.

### PRACTICE COMMENTARY

This instruction should be given with either Instruction No. 8.030, Scope of Employment—Presumption and Burden of Production, or Instruction No. 8.040, Scope of Employment, whichever is appropriate.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.060
## Scope of Employment: Intentional Acts

**An employee's act may be within the scope of employment even though the act is willful or malicious.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 845–47, 832 S.E.2d 15, 23–24 (2019)*; *A.H. v. Church of God in Christ, Inc., 297 Va. 604, 634, 831 S.E.2d 460, 477 (2019)*; *Parker v. Carilion Clinic, 296 Va. 319, 340–41, 819 S.E.2d 809, 821–22 (2018)*; *VanBuren v. Grubb, 284 Va. 584, 590–93, 733 S.E.2d 919, 922–24 (2012)*; *Gina Chin & Assocs., Inc. v. First Union Bank, 260 Va. 533, 541–44, 537 S.E.2d 573, 577–78 (2000)*; *Plummer v. Ctr. Psychiatrists, Ltd., 252 Va. 233, 236–37, 476 S.E.2d 172, 174 (1996)*; *Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 45, 453 S.E.2d 261, 266 (1995)*; *Tri-State Coach Corp. v. Walsh, 188 Va. 299, 305–06, 49 S.E.2d 363, 366 (1948)*; *Davis v. Merrill, 133 Va. 69, 74, 112 S.E. 628, 629–30 (1922).*

### PRACTICE COMMENTARY

An employee's former supervisor or manager may be jointly liable with the employer for the supervisor's or manager's wrongful termination of the employee. *VanBuren, 284 Va.* at *591–93, 733 S.E.2d* at *923–24.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.070
## Employer's Liability for Acts of Employee's Assistant

**An employer is liable for the actions of a person assisting an employee** [if obtaining the assistance was within the scope of the employee's job; if the employer knowingly approved the use of assistance]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Jacobson v. Kirn, 192 Va. 352, 358–59, 64 S.E.2d 755, 759 (1951)*; *Moncier v. Green, 182 Va. 127, 131, 27 S.E.2d 921, 922–23 (1943)*; *Clover Creamery Co. v. Kanode, 142 Va. 542, 547–48, 129 S.E. 222, 223 (1925)*; *Board of Trade Bldg. Corp. v. Cralle, 109 Va. 246, 250, 63 S.E. 995, 997 (1909)*.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- The bracketed portion of the instruction should be used in the alternative based upon the particular facts of the case. *See, e.g., Jacobson, 192 Va. at 358–60, 64 S.E.2d at 759–60.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 34

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.080
## Special Employer Liable for Acts of Borrowed Employee

**If** (name of employee) **was temporarily under the control of** (name of special employer), **then** (name of special employer) **is solely liable for injuries caused by** (name of employee) **within the scope of his employment for** (name of special employer).

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 687, 594 S.E.2d 908, 911 (2004)*; *Metro Mach. Corp. v. Mizenko, 244 Va. 78, 82–83, 419 S.E.2d 632, 634–35 (1992)*; *Kay Mgmt. Co., Inc. v. Creason, 220 Va. 820, 827–28, 263 S.E.2d 394, 399 (1980)*; *Coker v. Gunter, 191 Va. 747, 753–54, 63 S.E.2d 15, 18 (1951)*; *Beasley v. Whitehurst, 152 Va. 305, 310–11, 147 S.E. 194, 196 (1929)*.

### Practice Commentary

This instruction applies to those cases where an employee of one employer temporarily works for and under the control of another employer. For instance, it could be applicable if a construction company rented a bulldozer or a crane and the operator came with the equipment, control of the operator being transferred to the construction company.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia, Chapters 9 & 26

Kent Sinclair, Virginia Remedies, Chapter 34

Michie's Jurisprudence, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.100
## Definition of Independent Contractor

**An independent contractor is a person who is engaged to produce a specific result but who is not subject to the control of the employer as to the way he brings about that result.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 60–61, 645 S.E.2d 520, 523–24 (2007)*; *Atkinson v. Sachno, 261 Va. 278, 284–85, 541 S.E.2d 902, 905 (2001)*; *McDonald v. Hampton Training Sch. for Nurses, 254 Va. 79, 81, 486 S.E.2d 299, 300–01 (1997)*; *Hadeed v. Medic-24, Ltd., 237 Va. 277, 288, 377 S.E.2d 589, 594–95 (1989)*; *Richmond Newspapers, Inc. v. Gill, 224 Va. 92, 97–99, 294 S.E.2d 840, 843–44 (1982)*; *Epperson v. DeJarnette, 164 Va. 482, 486, 180 S.E. 412, 413–14 (1935)*.

### PRACTICE COMMENTARY

It is the power to control rather than the actual use of that power that differentiates an agency from independent employment. Whether one has the power to control will often be a jury question. Four factors enter into determination of the question whether a master-servant or independent contractor relationship exists within the contemplation of the doctrine of respondeat superior: (1) selection and engagement, (2) payment of compensation, (3) power of dismissal, and (4) power to control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control is determinative. *Ogunde, 274 Va. at 60–61, 645 S.E.2d at 523–24*; *Atkinson, 261 Va. at 284–85, 541 S.E.2d at 905*; *Hadeed v. Medic-24, Ltd., 237 Va. at 288, 377 S.E.2d at 594–95*.

### *ALERTS:*

- Whether a person is an employee or an independent contractor is generally a question of fact for the jury. *Atkinson, 261 Va. at 284, 541 S.E.2d at 905*. Where the evidence admits only one conclusion, the question is a matter of law. *McDonald, 254 Va. at 87, 486 S.E.2d at 304.*

- Whether an off-duty police officer acts as an employee of a private employer or as a public officer enforcing a public duty at the time of tortious conduct is a factual question. *City of Alexandria v. J-W Enters., Inc., 279 Va. 711, 717–18, 691 S.E.2d 769, 772 (2010).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.110
## Principal Not Liable for Acts of Independent Contractor

**A person who hires an independent contractor is not liable for the independent contractor's actions.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sanchez v. Medicorp Health Sys., 270 Va. 299, 304–05, 618 S.E.2d 331, 334 (2005)*; *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 689, 594 S.E.2d 908, 912 (2004)*; *Chesapeake & Potomac Tel. Co. of Va. v. Properties One, Inc., 247 Va. 136, 140–41, 439 S.E.2d 369, 372 (1994)*; *Kesler v. Allen, 233 Va. 130, 134, 353 S.E.2d 777, 780 (1987)*; *Norfolk & W. Ry. Co. v. Johnson, 207 Va. 980, 983, 154 S.E.2d 134, 137 (1967)*; *Smith v. Grenadier, 203 Va. 740, 747, 127 S.E.2d 107, 112 (1962)*.

## PRACTICE COMMENTARY

Generally, "an owner who employs an independent contractor is not liable for injuries to third persons caused by the contractor's negligence. Exceptions exist . . . [where] the independent contractor's torts arise directly out of his use of a dangerous instrumentality, arise out of work that is inherently dangerous, are wrongful *per se*, are a nuisance, or are such that it would in the natural course of events produce injury unless special precautions were taken." In the absence of one of these exceptions, a landlord has no vicarious liability to a tenant for the negligence of an independent contractor in making repairs or improvements. *Kesler, 233 Va. at 134, 353 S.E.2d at 780.*

In *Love v. Schmidt, 239 Va. 357, 360–61, 389 S.E.2d 707, 709–10 (1990)*, the Court held that a landlord's duty to maintain his premises in a reasonably safe condition cannot be delegated to an independent maintenance contractor.

In *Sanchez*, the Court expressly declined to adopt the theory of apparent or ostensible agency to impose vicarious liability on a hospital for the alleged negligence of a physician working as an independent contractor in its emergency room. *Sanchez, 270 Va. at 307–08, 618 S.E.2d at 335.*

In *Phillip Morris, Inc. v. Emerson, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988)*, the Court recognized the tort of negligent retention of an independent contractor.

Once work done by an admittedly independent contractor has been accepted by the employer, that employer is liable to others, according usually to the rules governing the liability of owners and occupants of land. See Chapter 23, Owners and Occupants. *See also City of Richmond v. Branch, 205 Va. 424, 429, 137 S.E.2d 882, 885 (1964)*; *King v. Hartung, 123 Va. 185, 190–91, 96 S.E. 202, 204 (1918)*; *City of Richmond v. Jackson, 118 Va. 674, 679–81, 88 S.E. 49, 51 (1916)*; *McCrorey v. Thomas, 109 Va. 373, 379–80, 63 S.E. 1011, 1013 (1909)*. However, acceptance of an independent contractor's work by the owner of the property or the employer of that contractor is not a defense to a claim against the contractor for personal injury, wrongful death or property damage resulting from the negligence of, or breach of warranty by, such contractor. *Va. Code § 8.01-39*; *Tingler v. Graystone Homes, Inc., 298 Va. 63, 87–89, 834 S.E.2d 244, 258–59 (2019)*.

☞ ***PRACTICE POINTER:*** To determine whether an activity is inherently danger-

ous, see *Emerson, 235 Va. at 406–07, 368 S.E.2d at 282–83*; *Broaddus v. Standard Drug Co., 211 Va. 645, 649–50 179 S.E.2d 497, 501 (1971)*; *Johnson, 207 Va. at 983–88, 154 S.E.2d at 137–40*; *T.E. Ritter Corp. v. Rose, 200 Va. 736, 742, 107 S.E.2d 479, 483–84 (1959)*; *Bibb's Adm'r v. Norfolk & W. R.R. Co., 87 Va. 711, 742, 14 S.E. 163, 173–74 (1891)*.

### *ALERTS:*

• A person who engages an independent contractor to perform work that the person knows is likely to involve a peculiar, unreasonable risk of physical harm to others unless special precautions are taken, or unless the work is skillfully and carefully done, has a duty to exercise reasonable care to employ a competent and careful contractor. If such person or entity fails to exercise reasonable care, then the person is liable to the plaintiff for injuries received as a proximate cause of the defendant's negligence. *Emerson, 235 Va. at 399–400, 368 S.E.2d at 278*. In such a case, use the following instruction:

> A person who hires an independent contractor and knows, or should know, that the performance of the work is likely to involve a peculiar, unreasonable risk of physical harm to others has a duty to exercise reasonable care in hiring the independent contractor.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Partnership §§ 1 through 100

## Instruction No. 8.120
## Definition of Business Joint Venture: Liability of Co-Venturers

**When two or more persons join in a business enterprise for their mutual benefit with an understanding that they are to share in the profits or losses and that each is to have a right to control or manage, then each one is liable for any negligence of the other[s] that is committed within the scope of the enterprise.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *PGI, Inc. v. Rathe Prods., Inc., 265 Va. 334, 340, 342–43, 576 S.E.2d 438, 441–43 (2003)*; *Wells v. Whitaker, 207 Va. 616, 623–26, 151 S.E.2d 422, 429–30 (1966)*; *Smith v. Grenadier, 203 Va. 740, 744, 127 S.E.2d 107, 110 (1962)*; *Wiley N. Jackson Co., Inc. v. City of Norfolk, 197 Va. 62, 67–68, 87 S.E.2d 781, 784–85 (1955)*.

### PRACTICE COMMENTARY

Where the undertaking involves ownership of property, it may be a partnership. See Instruction No. 8.150, Definition of Partnership: Liability of Partners. Where the undertaking is not to produce profit, it is a non-business joint enterprise and Instruction No. 8.130, Definition of Non-Business Joint Enterprise: Liability of Participants, is applicable.

The understanding as to profits and losses and as to control and management may be implied or express.

*Roark v. Hicks, 234 Va. 470, 476, 362 S.E.2d 711, 714 (1987)*, held that Va. Code Ann. § 8.01-246(3)'s five-year statute of limitations governing actions between partners also governs actions between joint venturers.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Negligence § 44; Partnership §§ 1 through 100

## Instruction No. 8.130
## Definition of Non-Business Joint Enterprise: Liability of Participants

**When two or more persons undertake an activity with a common purpose and have a right to a voice in the operation and control of the activity, then each is liable for any negligence of the other[s] that is committed within the scope of the activity.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Alban Tractor Co. v. Sheffield, 220 Va. 861, 863–64, 263 S.E.2d 67, 68–69 (1980)*; *MacGregor v. Bradshaw, 193 Va. 787, 795–96, 71 S.E.2d 361, 366–67 (1952)*; *Miles v. Rose, 162 Va. 572, 584–86, 175 S.E. 230, 235–36 (1934)*.

### PRACTICE COMMENTARY

Where the undertaking is to produce profits, it is a joint business venture and Instruction No. 8.150, Definition of Partnership: Liability of Partners, is applicable.

A husband and wife can enter into a joint enterprise, but the joint undertaking must arise from a mutual interest in the accomplishment of a common purpose and not merely from the marriage relationship. *Virginia Transit Co. v. Simmons, 198 Va. 122, 126–27, 92 S.E.2d 291, 294–95 (1956)*; *Painter v. Lingon, 193 Va. 840, 847–49, 71 S.E.2d 355, 359–60 (1952)*; *Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 658–59, 91 S.E. 632, 633 (1917)*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Negligence § 44; Partnership §§ 1 through 100

## Instruction No. 8.140
## Joint Enterprise: Right of Control

**The right to have a voice in the operation and control of the enterprise or activity must result from the circumstances, purpose, and nature of the joint undertaking, and not merely from a social act of courtesy.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Alban Tractor Co. v. Sheffield, 220 Va. 861, 863–64, 263 S.E.2d 67, 68–69 (1980)*; *Miller v. Query, 201 Va. 193, 198, 110 S.E.2d 198, 201–02 (1959)*; *Carroll v. Hutchinson, 172 Va. 43, 53–54, 200 S.E. 644, 648–49 (1939).*

**PRACTICE COMMENTARY**

None.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Negligence § 44; Partnership §§ 1 through 100

## Instruction No. 8.150
## Definition of Partnership: Liability of Partners

**When two or more persons carry on a business for profit as co-owners, they are partners. Each one is liable for any negligence of the other[s] that is committed within the scope of the business.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 50-73.79, 50-73.95, 50-73.96, 8.01-279(C).

**CASE AUTHORITY:** *Landcraft Co., Inc. v. Kincaid, 220 Va. 865, 869–70, 263 S.E.2d 419, 422–23 (1980)*; *Cooper v. Knox, 197 Va. 602, 606, 90 S.E.2d 844, 847 (1956)*; *Henry Myers & Co. v. Lewis, 121 Va. 50, 73–74, 92 S.E. 988, 995–96 (1917)*.

## PRACTICE COMMENTARY

Co-ownership of the business is what distinguishes a partnership from other similar business relationships. If co-ownership of property is not present, the parties may be engaged in a joint venture. See Instruction No. 8.130, Definition of Non-Business Joint Enterprise: Liability of Participants.

The instruction is taken from Article 3 of the Uniform Partnership Act, § 50–73. There is decisional law that fleshes out the definition. For example, there must be an oral or written agreement to carry on a business for profit. Since these cases often arose when the putative partners were litigating amongst themselves, the strictness with which elements are examined will probably not carry over where a business relationship is involved in a suit by an outsider for personal injuries. *Cooper, 197 Va. at 606–07, 90 S.E.2d at 847.*

Partnerships, joint ventures, and joint enterprises all impose liability on all participants for negligence within the scope of the undertaking. Va. Code Ann. § 50-73.96(A).

☞ ***PRACTICE POINTER:*** A husband and wife may enter into a partnership, but there must be an agreement to do so that is based on more than the marriage relationship. *Virginia Transit Co. v. Simmons, 198 Va. 122, 127, 92 S.E.2d 291, 295 (1956)*; *Painter v. Lingon, 193 Va. 840, 848–49, 71 S.E.2d 355, 359–60 (1952)*; *Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 658–59, 91 S.E. 632, 633 (1917)*.

## *ALERTS:*

- When parties sue or are sued as partners, the existence of the partnership is established by allegations in the pleadings unless they are contested in an affidavit denying the existence of the partnership. Va. Code Ann. § 8.01-279(C). But see Va. Sup. Ct. R. 1:10 (affidavit requirement can be waived if there is no objection). If the proper allegations are made and not denied, the following instruction should be given instead of the instruction above:

  (Name of partners) are partners. Each one is liable for any negligence of the other[s] that is committed within the scope of the business.

- A partner who enters a partnership after the liability-producing incident is not personally liable for any partnership obligation incurred before the person's admission as a partner. Va. Code Ann. § 50-73.96(B).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 9 & 26

MICHIE'S JURISPRUDENCE, Agency §§ 1 through 126; Independent Contractors §§ 1 through 21; Joint Ventures §§ 1 through 8; Master and Servant §§ 1 through 110; Negligence § 44; Partnership §§ 1 through 100

# Chapter 9

# DAMAGES

## Scope Note


**Instruction No. 9.000** General Personal Injury and Property Damage

**Instruction No. 9.010** Reasonable Proof

**Instruction No. 9.015** Collateral Source Rule

**Instruction No. 9.020** Duty to Mitigate Damages

**Instruction No. 9.030** Aggravation of Pre-Existing Condition

**Instruction No. 9.040** Aggravation of Injuries by Health Care Provider

**Instruction No. 9.050** Property Damage: Total Loss—Diminution in Value Measure of Damages

**Instruction No. 9.060** Property Damage: Partial Loss—Cost of Repairs Measure of Damages

**Instruction No. 9.070** Property Damage: Partial but Disputed Loss—Measure of Damages

**Instruction No. 9.080** General Punitive Damages

**Instruction No. 9.090** Punitive Damages: Definition of Common Law Actual Malice

**Instruction No. 9.100** Damages: Death by Wrongful Act

**Instruction No. 9.105** Punitive Damages: Death by Wrongful Act

**Instruction No. 9.110** Contributory Negligence of Beneficiary: Death by Wrongful Act

**Instruction No. 9.120** Life Expectancy/Mortality Table

# SCOPE NOTE

The instructions in this chapter cover the topic of damages generally. Although their primary use is in negligence cases, many can be adapted for use in other areas. They supplement more specific damage instructions in other chapters. Damages categories inapplicable to a particular case should be omitted from the instruction. For example, if there is no evidence of property damage or of disfigurement or deformity, those items should be deleted from the instruction.

Instruction No. 9.000 itemizes the types of damages to be considered in determining a personal injury and property damage award. Instruction No. 9.010 explains the burden of proof and the principle of reasonableness applicable to the items of damage claimed by the plaintiff and should be used in conjunction with Instruction No. 9.000.

The remaining damage instructions will not necessarily be applicable in every case. Instruction No. 9.015 sets forth the "collateral source rule." See *Dominion Resources, Inc. v. Alstom Power, Inc., 297 Va. 262, 272–74, 825 S.E.2d 752, 757 (2019)* (holding that the "collateral source rule" applies in certain contract claim scenarios); *Acuar v. Letourneau, 260 Va. 180, 188–89, 531 S.E.2d 316, 320 (2000)* (holding that the "collateral source rule" applies to tort claims). Instruction No. 9.020 describes the plaintiff's duty to mitigate damages. While the plaintiff is required to mitigate damages in every instance, this instruction is appropriate only if there is some tangible indication that he did not. Instruction No. 9.030 covers aggravation of a pre-existing condition. Instruction No. 9.040 covers aggravation of the plaintiff's injuries by a health care provider. These instructions will be appropriate only when supported by the evidence.

Instructions No. 9.050 to 9.070 describe the measure of damages for total or partial destruction of the plaintiff's property. Instruction No. 9.050 sets forth the "diminution in value" standard for cases involving a total loss of property. Instruction No. 9.060 sets forth the "cost of repair" rule for partially damaged property that can be restored to its former condition by repairs. Instruction No. 9.070 sets forth both rules for cases where the severity of the loss is disputed.

Punitive damages are appropriate in certain cases. There must be an express demand for punitive damages in the prayer for relief or ad damnum clause. *Harrell v. Woodson, 233 Va. 117, 122, 353 S.E.2d 770, 773 (1987).* Instruction No. 9.080 defines the circumstances in which punitive damages are recoverable: when there is actual malice or a willful and wanton disregard for another's rights. It also describes to the jury the reason for granting such damages: to punish the defendant and deter others. This serves as a guide for determining the amount of punitive damages, if any, to be awarded. Instruction No. 9.090, which defines "actual malice," should be used in conjunction with Instruction No. 9.080.

Instruction No. 9.100 lists the statutory categories of compensatory damages in wrongful death cases, along with the statutory beneficiaries to whom those damages may be distributed. Instruction No. 9.105 covers the statutory elements, basis and distribution of punitive damages in wrongful death cases. Instruction No. 9.110 states that a wrongful death beneficiary's negligence which proximately caused the decedent's death precludes him from participating in the distribution. Instruction No. 9.120 explains the evidentiary effect of a life expectancy figure introduced into evidence.

**Instruction No. 9.000**
**General Personal Injury and Property Damage**

**[If you find your verdict for the plaintiff, then, in] [In] determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant:**

**(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;**

**(2) any physical pain** [and mental anguish] **he suffered in the past** [and any that he may be reasonably expected to suffer in the future];

**(3) any disfigurement or deformity and any associated humiliation or embarrassment;**

**(4) any inconvenience caused in the past** [and any that probably will be caused in the future];

**(5) any medical expenses incurred in the past** [and any that may be reasonably expected to occur in the future];

**(6) any earnings he lost because he was unable to work at his calling;**

**(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;**

**(8) any property damage he sustained.**

**Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendant's negligence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973)* (stating that compensatory damages are designed to "make the plaintiff whole"); *News Leader Co. v. Kocen, 173 Va. 95, 108, 3 S.E.2d 385, 391 (1939)* ("Actual or compensatory damages, the terms being synonymous, are damages in satisfaction of, or in recompense for, loss or injury sustained. Either term covers all loss recoverable as a matter of right and includes all damages other than punitive or exemplary damages."); *Weatherford v. Birchett, 158 Va. 741, 746–47, 164 S.E. 535, 537 (1932)* ("Compensatory damages are those allowed as a recompense for the injury actually received, and include compensation for insult, pain, humiliation, mental suffering, injury to the reputation, and the like").

## PRACTICE COMMENTARY

The first bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

When using this instruction, omit any of the subparagraphs (1)–(8) that are inapplicable to the case and renumber accordingly.

### *Common Categories of Injury*

***Pre-existing Condition.*** A defendant's liability for damages caused by the defendant's negligence is not reduced even though the plaintiff's injuries were made more severe or more difficult to cure because of a pre-existing physical or mental condition. *Beasley v. Bosschermuller, 206 Va. 360, 369, 143 S.E.2d 881, 888 (1965)* See Instruction No. 9.030, Aggravation of Pre-Existing Condition.

***Pain and Suffering.*** An instruction on pain and suffering is proper when there is direct evidence to support it or when it can be inferred from the circumstances of the case. It is better practice to link the elements of pain and suffering in a single instruction; undue emphasis on one or the other may make an instruction objectionable as argumentative and/or repetitious. *Bruce v. Madden, 208 Va. 636, 639–42, 160 S.E.2d 137, 139–41 (1968).*

The "loss of enjoyment of life" is not recognized as a separately compensable element of damages in personal injury cases. It is encompassed in the pain and suffering instruction; and while it may be argued, it may not be separately instructed upon. *Bulala v. Boyd, 239 Va. 218, 232, 389 S.E.2d 670, 677 (1990).*

Plaintiff's age is not to be considered when calculating damages for suffering. Age may be considered, however, in determining lost earning power. *Sykes v. Brown, 156 Va. 881, 887, 159 S.E. 202, 205 (1931).*

***Disfigurement, deformity, humiliation, and embarrassment.*** There must be testimony or other evidence that there was a deformity, but there does not need to be direct testimonial evidence of humiliation and embarrassment to submit such a claim to the jury. *Sea-Land Serv., Inc. v. O'Neal, 224 Va. 343, 354, 297 S.E.2d 647, 653 (1982)* (allowing recovery for humiliation and embarrassment resulting from

an intentional tort of fraud that caused the loss of employment); *Naccash v. Burger, 223 Va. 406, 416–17, 290 S.E.2d 825, 830 (1982)* (allowing inferred emotional damages to plaintiffs whose daughter died from undiagnosed Tay-Sachs disease); *Armstead v. James, 220 Va. 171, 173–74, 257 S.E.2d 767, 769 (1979).*

***Inconvenience.*** Future discomfort and inconvenience may be inferred from the fact that the plaintiff is still suffering at the time of trial. *Todt v. Shaw, 223 Va. 123, 128, 286 S.E.2d 211, 213 (1982).*

***Medical expenses.*** It is not necessary for recovery that medical expenses were actually paid. *Acuar, 260 Va. at 192, 531 S.E.2d at 322 (2000)*; *Sykes v. Brown, 156 Va. at 887, 159 S.E. at 205*. Medical expenses offered for the limited purpose of establishing the probability that plaintiff experienced pain and suffering as a result of an automobile accident are admissible even though plaintiff's obligation to pay them has been discharged in bankruptcy. *Barkley v. Wallace, 267 Va. 369, 372–74, 595 S.E.2d 271, 273–74 (2004).*

The four necessary components for proving medical expenses by the introduction of bills through the sole testimony of the plaintiff are: (1) authenticity; (2) reasonableness in amount; (3) medical necessity; and (4) causal relationship. *McMunn v. Tatum, 237 Va. 558, 568, 379 S.E.2d 908, 913 (1989)*; see also Va. Code Ann. § 8.01-413.01 (stating the requirements for a plaintiff to establish a rebuttable presumption of authenticity of medical bills and reasonableness of medical expenses in motor vehicle cases).

A doctor or other health care provider's testimony is not necessarily a prerequisite to giving an instruction on medical expenses, but such testimony is necessary where the defendant objects to the introduction of medical bills and contests medical necessity and causal relationship. *Norfolk Beverage Co. v. Cho, 259 Va. 348, 352–53, 525 S.E.2d 287, 289–90 (2000).* See also *McMunn, 237 Va. at 569, 379 S.E.2d at 913*, and Va. Code Ann. § 8.01-413.01, which discuss the circumstances and requirements for admission of medical bills and the presumption created by their admission.

Future medical expenses are speculative when the testimony establishes only that the plaintiff might require future surgery. *State Farm Mut. Auto. Ins. Co. v. Kendrick, 254 Va. 206, 208–09, 491 S.E.2d 286, 287–88 (1997).*

***Lost earnings.*** Lost earnings are based on gross pay and not the net or "take home pay." *Hoge v. Anderson, 200 Va. 364, 367–68, 106 S.E.2d 121, 123–24 (1958).* Loss of earnings damages may be recovered even though plaintiff received his regular monthly salary from his employer during the period of his disability. *Bullard v. Alfonso, 267 Va. 743, 749, 595 S.E.2d 284, 287 (2004)*; Va. Code Ann. § 8.01-35.

***Loss of future earning capacity.*** For a discussion of loss of future earning capacity, see *Bailey v. Henderson, 240 Va. 1, 3–4, 392 S.E.2d 681, 682 (1990)*, *Clark v. Chapman, 238 Va. 655, 662–67, 385 S.E.2d 885, 889–92 (1989)*, and *Exxon Corp. v. Fulgham, 224 Va. 235, 240, 294 S.E.2d 894, 897 (1982).*

"In a personal injury action, a plaintiff is not precluded from recovering damages for lost future earnings or for diminution of earning capacity by reason of his infancy." *Bulala, 239 Va. at 233, 389 S.E.2d at 677.*

To calculate such loss, evidence must be grounded upon facts specific to the individual whose loss is being calculated and not based entirely on statistics and assumptions. *Id. at 232–33, 389 S.E.2d at 677–78.*

Expert testimony about a decedent's expected loss of income and the economic value of the loss of services, protection, care, and assistance is inadmissible when based on remote and speculative assumptions. *Vasquez v. Mabini, 269 Va. 155, 159–60, 606 S.E.2d 809, 811 (2005).*

The degree of evidence required to prevent the award from being impermissibly speculative corresponds to the amount of time the plaintiff is expected to be out of work. The longer the timeframe of future lost income claimed, the more significant the evidentiary basis required to support the award. *Egan v. Butler, 290 Va. 62, 71, 772 S.E.2d 756, 771 (2015).*

***Lost profits.*** Lost profits may be recovered if proven with reasonable certainty as to the amount of the damages and the cause from which they resulted. When an established business is injured, interrupted, or destroyed, the measure of damages is the diminution in value of the business by reason of the wrongful act, measured by the loss of the usual profits from the business. *Banks v. Mario Indus. of Virginia Inc., 274 Va. 438, 455, 650 S.E.2d 687, 696 (2007).*

In determining damages for breach of a covenant not to compete, subsequent profits from the benefiting competitors may be used as evidence, provided that the profits can be sufficiently tied to the injuring party. *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 400, 732 S.E.2d 676, 686 (2012).*

Va. Code Ann. § 8.01-221.1 allows a new or an unestablished business to recover lost profits upon "proper proof." Moreover, "[a] party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation." *Id.*

In business tort cases, the Supreme Court of Virginia has held that lost profits must be proximately caused by defendant's wrongful conduct. *Saks Fifth Avenue, Inc. v. James, Ltd., 272 Va. 177, 188–89, 630 S.E.2d 304, 311–12 (2006).*

***Property damage.*** See Instructions No. 9.050, Property Damage: Total Loss—Diminution in Value Measure of Damages, 9.060, Property Damage: Partial Loss—Cost of Repairs Measure of Damages and 9.070, Property Damage: Partial but Disputed Loss—Measure of Damages for additional property damage instructions.

Other Issues, Limitations & Damages Categories

***Attorney's Fees.*** Virginia follows the American rule on attorney's fees, under which "[g]enerally, absent a specific contractual or statutory provision to the contrary, attorney's fees are not recoverable by a prevailing litigant from the losing

litigant." *REVI, LLC v. Chicago Title Ins. Co., 290 Va. 203, 213, 776 S.E.2d 808, 813 (2015).* Further, the general rule under Virginia law is that attorneys' fees are not recoverable as damages. *Hiss v. Friedberg, 201 Va. 572, 577, 112 S.E.2d 871, 875–76 (1960).* However, "where a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred." *Id.* Additionally, plaintiff's damages for a breach of a covenant not to sue may be the amount of the attorney's fees incurred by the plaintiff in defending actions that breached the agreement. *Bolton v. McKinney, 299 Va. 550, 556–57, 855 S.E.2d 853, 857 (2021).*

***Collateral Source Doctrine.*** For a discussion of the collateral source doctrine, see Instruction No. 9.015, Collateral Source Rule.

***Emotional Distress Issues.*** While damages for emotional distress are ordinarily not recoverable unless they result directly from tortiously caused physical injury, exceptions to the rule are found in *Bowers v. Westvaco Corp., 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992)* (holding litigant and family members could recover for emotional distress as an element of damages in a nuisance suit when the nuisance endangered life or health); *Fairfax Hosp. Sys., Inc. v. McCarty, 244 Va. 28, 37, 419 S.E.2d 621, 626–27 (1992)* (holding mother could recover for her emotional distress resulting from injuries to her fetus caused by negligence during delivery); *Bulala, 239 Va. at 229, 389 S.E.2d at 675* (holding mother could recover for mental suffering from birth of defective child); *Sea-Land Service, Inc., 224 Va. at 354, 297 S.E.2d at 653* (an award for compensatory damages is proper based on the victim's emotional distress from loss of her employment caused by the employer's fraud); *Naccash, 223 Va. at 415–16, 290 S.E.2d at 830* (noting that wrongful birth damages are permitted in limited circumstances); *Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974)* (holding plaintiff may recover when the tort is intentional or reckless, the tortfeasor's conduct is outrageous and intolerable, the emotional distress and the tortious conduct are causally linked, and the emotional distress is severe); and *Hughes v. Moore, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973)* (holding that emotional injury resulting in physical harm, proven by clear and convincing evidence, can be recoverable). See also *Howard v. Alexandria Hosp. 245 Va. 346, 350, 429 S.E.2d 22, 24 (1993)* (establishing the physical injury requirement). In cases involving animals, a plaintiff cannot recover for emotional distress resulting from injury to an animal, no matter how beloved the animal is. *Kondaurov v. Kerdasha, 271 Va. 646, 657–58, 629 S.E.2d 181, 186–87 (2006).*

For instructions on negligent and intentional infliction of emotional distress, see Chapter 33, **Emotional Distress**.

***Interest.*** For a discussion of prejudgment and post-judgment interest, see *Upper Occoquan Sewage Auth. v. Blake Constr. Co., Inc., 275 Va. 41, 63–65, 655 S.E.2d 10, 22–24 (2008).*

***Inadequate verdicts.*** "Where plaintiff's evidence of special damages is uncontroverted and so complete that no rational factfinder could disregard it, a verdict for

a lesser sum is inadequate as a matter of law." *Davoudlarian v. Krombein, 244 Va. 88, 91, 418 S.E.2d 868, 870 (1992).* Where the verdict form reflected that only two elements—loss of income and medical expenses—were considered in spite of jury instruction containing six elements for consideration and determination of damage award, the court held the verdict inadequate, reversed, and remanded for a new trial on damages. *DeWald v. King, 233 Va. 140, 146, 354 S.E.2d 60, 63 (1987)*; see also *Hall v. Hall, 240 Va. 360, 365, 397 S.E.2d 829, 832 (1990).*

A verdict for the exact amount of medical and special damages is inadequate as a matter of law. *Jenkins v. Pyles, 269 Va. 383, 390, 611 S.E.2d 404, 408 (2005)*; *Bowers v. Sprouse, 254 Va. 428, 431, 492 S.E.2d 637, 638 (1997).* But if the verdict is not for the exact amount, *Bowers* is not applicable, and the courts must review the evidence under traditional principles relating to the adequacy of jury verdicts. *Walker v. Mason, 257 Va. 65, 68, 510 S.E.2d 734, 735 (1999).*

***Inadequate verdict claim rejected.*** Where special damages are controverted, doubtful as to nature and extent, or subject to substantial question, whether attributable to defendant's wrong or some other cause, then it cannot be said that special damages constituted a fixed part of the jury verdict and the verdict should not be disturbed on a claim of inadequacy. *Hundley v. Osborne, 256 Va. 173, 177–78, 500 S.E.2d 810, 813 (1998)*; *Bradner v. Mitchell, 234 Va. 483, 487–88, 362 S.E.2d 718, 720–21 (1987).* In *Mastin v. Theirjung, 238 Va. 434, 437–39, 384 S.E.2d 86, 87–89 (1989)*, the Virginia Supreme Court upheld a zero-damage award where injuries could have been feigned or could have arisen from some cause unrelated to the incident. In *Gilliam v. Immel*, the Court, following *Mastin*, upheld a zero-damage award where "evidence as to the nature and extent of [the plaintiff's] injuries were not only in conflict, but dependent upon the credibility and weight of the witness testimony." *Gilliam v. Immel, 293 Va. 18, 24, 795 S.E.2d 458, 461(2017).* See also *Vilseck v. Campbell, 242 Va. 10, 14–15, 405 S.E.2d 614, 616 (1991)* (upholding an award of zero damages).

Absent unusual circumstances, the trial court may not set aside a verdict for the plaintiff on defendant's motion claiming that the verdict was inadequate. *Shepherd v. Smith, 265 Va. 327, 331, 576 S.E.2d 427, 429 (2003).*

***Excessive verdicts and remittitur.*** For a discussion of the standards governing remittitur, see *Allied Concrete Co. v. Lester, 285 Va. 295, 311–13, 736 S.E.2d 699, 707–09 (2013).* For a discussion of the criteria for judicial review of the amount of compensatory damages on a motion for remittitur, see *Baldwin v. McConnell, 273 Va. 650, 658, 643 S.E.2d 703, 707 (2007)*; see also *Poulston v. Rock, 251 Va. 254, 263, 467 S.E.2d 479, 484 (1996).*

***Excessive verdict claim rejected.*** See generally *John Crane, Inc. v. Jones, 274 Va. 581, 594–97, 650 S.E.2d 851, 857–59 (2007)* (rejecting an "average verdict" rule); *Rose v. Jaques, 268 Va. 137, 159–60, 597 S.E.2d 64, 76–77 (2004)* (rejecting a "verdict comparison analysis"); *Shepard v. Capitol Foundry of Virginia, 262 Va. 715, 721–23, 554 S.E.2d 72, 75–77 (2001)* (reversing trial court's setting aside of the jury verdict and holding that the trial court did not give adequate weight to

plaintiff's sorrow and mental anguish); *Norfolk Beverage Co., 259 Va. at 354, 525 S.E.2d at 290–91* (finding verdicts not shocking in light of jury instructions and evidence, including plaintiffs' humiliation and injuries); *Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 261–62, 520 S.E.2d 164, 180 (1999)* (finding compelling evidence of plaintiff's suffering); *Edmiston v. Kupsenel, 205 Va. 198, 204, 135 S.E.2d 777, 781 (1964)* (holding that plaintiff's injuries were permanent and disabling).

***Medical Evidence Not Required for Causal Connection.*** Direct medical evidence is not a prerequisite to establishing a causal connection between an accident and injury or specific loss related to an injury. *Todt, 223 Va. at 126–27, 129, 286 S.E.2d at 213, 215*; *Peterson v. Neme, 222 Va. 477, 483–84, 281 S.E.2d 869, 872 (1981)*; *Sumner v. Smith, 220 Va. 222, 226, 257 S.E.2d 825, 827 (1979).*

***Multiple Causes of Action for One Set of Facts.*** A party with two valid causes of action is entitled to seek compensation in each but is estopped from collecting the full amount of damages in the second action if his damages were partially or fully paid in the first action. *Nizan v. Wells Fargo Bank Minn. Nat'l Ass'n, 274 Va. 481, 491, 650 S.E.2d 497, 502 (2007).* The defense of "double recovery" is a defense to recovery of damages in contract-based actions and, unless a particular provision of the UCC displaces the defense, it is available in a UCC-based claim. *Id.*

In cases involving a claim for wrongful death as well as an alternate survival claim for personal injuries sustained prior to death, both of which allegedly arose from the same acts of medical negligence, the plaintiff is required to elect between the personal injury survival claim and the wrongful death claim only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause. *Centra Health, Inc. v. Mullins, 277 Va. 59, 78–79, 670 S.E.2d 708, 718 (2009).*

***Wrongful pregnancy.*** An action for wrongful pregnancy exists, and general personal injury damages are recoverable; however, costs of raising a healthy child to majority are not recoverable. *Miller v. Johnson, 231 Va. 177, 182, 186–87, 343 S.E.2d 301, 304, 307 (1986).*

***Statutory Limitations on Recovery of Damages.*** The provisions of Va. Code Ann. § 38.2-5000 et seq., "Virginia Birth-Related Neurological Injury Compensation Act," control both the procedure for determination of claims for certain neurological injuries sustained by infants during the course of labor, delivery, and use of a resuscitator as well as the amount and type of damages awarded.

Under the Virginia Medical Malpractice Act, the total damages recoverable in a medical malpractice action for injury to a patient are limited to the statutory amount regardless of the number of legal theories upon which claims are based. Va. Code Ann. § 8.01-581.15; *Bulala, 239 Va. at 228, 389 S.E.2d at 675.*

***Presentation of Damages to the Factfinder.*** It is error to allow counsel to submit to the jury a per diem evaluation of plaintiff's pain and suffering,

disfigurement and deformity, and inconvenience. *Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 115, 109 S.E.2d 126, 131 (1959).* The plaintiff may, however, request specific awards for different categories of damages during closing argument. *Wakole v. Barber, 283 Va. 488, 494–95, 722 S.E.2d 238, 241 (2012).*

***ALERTS:***

- Evidence of physical injury, medical damages, or out-of-pocket expenses is not a prerequisite to the recovery of compensatory damages. Evidence consisting solely of mental anguish, emotional distress and humiliation is sufficient to support a jury's award of compensatory damages where a cause of action exists independently of such harm. *Northern Virginia Kitchen, Bath & Basement, Inc. v. Ellis, 299 Va. 615, 624–27, 856 S.E.2d 593, 598–99 (2021).*

- In a case where there is any doubt as to when compelling an election between a survival claim and a wrongful death claim would be proper, bifurcation into separate proceedings to determine liability and damages may be the most practical means to obviate potential prejudice. The decision to bifurcate lies within the trial court's discretion. *Mullins, 277 Va. at 78, 670 S.E.2d at 718.*

- It is likely error to instruct the jury that damages may not exceed a specific sum, but the jury may be told that the award should not be in excess of the amount sued for in the motion for judgment. *Simmons v. Adams, 202 Va. 926, 932, 121 S.E.2d 379, 383–84 (1961).* Under Va. Code Ann. § 8.01-379.1, any party may inform the jury in the opening statement, closing argument, or both of the amount of damages sought by the plaintiff. The statute also allows the plaintiff to request any amount that is less than the ad damnum in the motion for judgment. *Id.* Further, opposing counsel may request that the jury be instructed that counsel's mention of the amount is not evidence in the case and should not be considered in determining the award. *Bell v. Kirby, 226 Va. 641, 645, 311 S.E.2d 799, 802 (1984)*; *Phillips v. Fulghum, 203 Va. 543, 546–47, 125 S.E.2d 835, 838 (1962)*; see also Instruction No. 2.180, Amount Sued for Is Not Evidence.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

**Instruction No. 9.010**
**Reasonable Proof**

**The burden is on the plaintiff to prove, by the greater weight of the evidence, each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 423, 732 S.E.2d 690, 699 (2012)*; *Condo. Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc., 281 Va. 561, 577–78, 709 S.E.2d 163, 173 (2011)*; *Isle of Wight County v. Nogiec, 281 Va. 140, 150, 704 S.E.2d 83, 87 (2011)*; *Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 157, 671 S.E.2d 132, 137 (2009)*; *D.C. McClain, Inc. v. Arlington Cnty., 249 Va. 131, 134, 452 S.E.2d 659, 666 (1995)*; *Taylor v. Flair Property Assocs., 248 Va. 410, 414, 448 S.E.2d 413, 416 (1994)*; *TechDyn Sys. Corp. v. Whittaker Corp, 245 Va. 291, 296, 427 S.E.2d 334, 337 (1993)*; *Oden v. Salch, 237 Va. 525, 535–36, 379 S.E.2d 346, 352 (1989)*; *Cooper v. Whiting Oil Co., 226 Va. 491, 496, 311 S.E.2d 757, 761 (1984)*; *Hailes v. Gonzales, 207 Va. 612, 614, 151 S.E.2d 388, 390 (1966)*; *Diggs v. Lail, 201 Va. 871, 876–77, 114 S.E.2d 743, 747–48 (1960)*; *Gwaltney v. Reed, 196 Va. 505, 507–08, 84 S.E.2d 501, 502 (1954).*

### PRACTICE COMMENTARY

The jury likely will be instructed in Instructions No. 3.000, Issues and Allocation of Burdens of Proof and 9.000, General Personal Injury and Property Damage, that the plaintiff has the burden of proving damages. This instruction serves as a supplement to those instructions and as an explanation that the plaintiff's proof only needs to be reasonable.

The plaintiff must show a causal connection between the defendant's wrongful conduct and the damages asserted. *Navar, Inc. v. Fed. Bus. Council, 291 Va. 338, 344, 784 S.E.2d 296, 299 (2016).* In *Cooper*, the Court ruled that when damages occur as a result of more than one cause, some being caused by the defendant and some not, it is for the jury to determine what part of the damages is attributable to the defendant. *Cooper, 226 Va. at 496, 311 S.E.2d at 761.* The burden is on the plaintiff to show within a reasonable degree of certainty the share of damages for which the defendant is responsible. *TechDyn Sys. Corp., 245 Va. at 296, 427 S.E.2d at 337.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.015
## Collateral Source Rule

**The presence or absence of insurance or benefits of any type, whether liability insurance, health insurance, or employment-related benefits for either the plaintiff or the defendant, is not to be considered by you [in any way in deciding the issue of liability or, if you find your verdict for the plaintiff,] in considering the issue of damages.**

**The existence or lack of insurance or benefits shall not enter into your discussions or deliberations in any way in deciding the issues in this case. You shall decide this case solely on the basis of the testimony and evidence presented in the courtroom, as well as the other instructions given to you by the court.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-35.

**Case Authority:** *Green v. Diagnostic Imaging Associates, P.C., 299 Va. 1, 15, 843 S.E.2d 371, 379 (2020)*; *Dominion Resources, Inc. v. Alstom Power, Inc., 297 Va. 262, 272–74, 825 S.E.2d 752, 757 (2019)*; *Nizan v. Wells Fargo Bank Minn. Nat'l Ass'n, 274 Va. at 491–93, 650 S.E.2d at 502–03 (2007)*; *Bullard v. Alfonso, 267 Va. 743, 749, 595 S.E.2d 284, 287 (2004)*; *Acordia of Va. Ins. Agency v. Genito Glenn, L.P., 263 Va. 377, 387, 560 S.E.2d 246, 251 (2002)*; *Acuar v. Letourneau, 260 Va. 180, 188–89, 531 S.E.2d 316, 320 (2000)*; *Schickling v. Aspinall, 235 Va. 472, 474, 369 S.E.2d 172, 174 (1988)*; *Walthew v. Davis, 201 Va. 557, 563, 111 S.E.2d 784, 788 (1960)*; *Burks v. Webb, 199 Va. 296, 304, 99 S.E.2d 629, 636 (1957)*; *Johnson v. Kellam, 162 Va. 757, 764, 175 S.E. 634, 636 (1934)*; *Owen v. Dixon, 162 Va. 601, 608, 175 S.E. 41, 43 (1934)*; *Baltimore & Ohio R.R. Co. v. Wightman's Adm'r, 70 Va. 431, 446 (1877)*.

## Practice Commentary

The bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

No appellate decision in Virginia has held that a jury should be instructed on this issue. The trial judge has discretion as to whether such an instruction should be given, either as part of the damages instructions in a case or in response to a question from the jury. Such an instruction is not routine, and its appropriateness should be considered in the context of the case. Note that where *the plaintiff* offers proof of collateral compensation, such an instruction should *not* be given. *Neeley v. Johnson, 215 Va. 565, 576, 211 S.E.2d 100, 109 (1975)*.

The Supreme Court of Virginia has applied the collateral source rule in tort cases for more than a century. *Acuar, 260 Va. at 188, 531 S.E.2d at 320.* Under this rule, "compensation or indemnity received by a tort victim from a source collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes." *Schickling, 235 Va. at 474, 369 S.E.2d at 174.* As the Court has often held, "the injured party should be made whole by the tortfeasor, not by a combination of compensation from the tortfeasor and collateral sources." *Bullard, 267 Va. at 746, 595 S.E.2d at 286.*

Various types of payments have been deemed to constitute collateral source recovery:

> Originally, the [collateral source] rule applied exclusively to claims *ex delicto*. In the early cases, the collateral compensation involved was money paid the plaintiff by his own insurer. Later cases have applied the rule to social security benefits, public and private pension payments, unemployment and workers' compensation benefits, vacation and sick leave allowances, and other payments made by employers to injured employees, both contractual and gratuitous.

*Acordia of Virginia Ins. Agency, 263 Va. at 387, 560 S.E.2d at 251.*

A party with two valid causes of action is entitled to seek compensation in each but is estopped from collecting the full amount of damages in the second action if they were partially or fully paid in the first action. *Green v. Diagnostic Imaging Associates, P.C., 299 Va. at 15, 843 S.E.2d at 379*; *Nizan, 274 Va. at 491–93, 650 S.E.2d at 502–03*. The defense of "double recovery" is a defense to recovery of damages in contract-based actions and, unless a particular provision of the UCC displaces the defense, it is available in a UCC-based claim. *Id.*

For a discussion of the apportionment of damages recoverable in a contribution action, see *Sullivan v. Robertson Drug Co., 273 Va. 84, 91, 639 S.E.2d 250, 255 (2007)*.

☞ ***PRACTICE POINTER:*** Compensation paid to the plaintiff by his employer is not deductible from the damages the tortfeasor owes. *Bullard, 267 Va. at 747, 595 S.E.2d at 286.*

☞ ***PRACTICE POINTER:*** In *Acuar, 260 Va. at 192, 531 S.E.2d at 322,* the Court held that the portions of bills for medical expenses written off by a plaintiff's health care providers could not be deducted from the amount of damages owed by a tortfeasor. See also *Radvany v. Davis, 262 Va. 308, 310, 551 S.E.2d 347, 348 (2001)*, which held inadmissible the amount of payments accepted by medical service providers.

### ***ALERTS:***

- The Supreme Court has cautioned that the collateral source rule and the joint tortfeasor rule "are capable of compatible coexistence only if their differing fields of operation are recognized and respected." *Acordia of Virginia. Ins. Agency, 263 Va. at 387, 560 S.E.2d at 251.* Thus, while the collateral source rule generally places upon the defendant-tortfeasor the full burden of his wrongdoing, where "the plaintiff's injury is the product of the combined wrongdoings of the defendant and a settling joint tortfeasor, the credit rule intercedes to ensure that the defendant will not be burdened with full restitution for an injury which . . . by settlement of a tort claim, the plaintiff implicitly attributes in part to the settling party." *Id. at 387–88.* Hence, the Supreme Court concluded that "the collateral source rule traditionally does not apply to settlement proceeds." *Id. at 388.*

- The Supreme Court has held that the collateral source rule also may apply in certain contract claim scenarios. *See Dominion Resources, Inc. v. Alstom Power, Inc., 297 Va. at 272–74, 825 S.E.2d at 757.*

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

See also Restatement (Second) of Torts § 920A (1979), which was expressly made applicable in Virginia by the Supreme Court in *Bullard, 267 at 747, 595 S.E.2d at 286.*

## Instruction No. 9.020
## Duty to Mitigate Damages

**The plaintiff has a duty to minimize his damages. If you find that the plaintiff did not act reasonably to minimize his damages and that, as a result, they increased, then he cannot recover the amount by which they increased.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Monahan v. Obici Med. Mgmt. Servs., 271 Va. 621, 633–34, 628 S.E.2d 330, 337 (2006)*; *Forbes v. Rapp, 269 Va. 374, 380, 611 S.E.2d 592, 595–96 (2005)*; *Sawyer v. Comerci, 264 Va. 68, 77, 563 S.E.2d 748, 754 (2002)*; *Lawrence v. Wirth, 226 Va. 408, 412, 309 S.E.2d 315, 317 (1983)*; *Armstead v. James, 220 Va. 171, 174, 257 S.E.2d 767, 769 (1979)*; *Brown v. Huddleston, 213 Va. 146, 147–48, 191 S.E.2d 234, 235 (1972)*; *Haywood v. Massie, 188 Va. 176, 182, 49 S.E.2d 281, 284 (1948)*; *Arminius Chem. Co. v. Landrum, 113 Va. 7, 19–20, 73 S.E. 459, 465 (1912)*.

### PRACTICE COMMENTARY

The increase in plaintiff's damages must be proved by the greater weight of the evidence or must appear from the plaintiff's own evidence. See the Sources & Authority to Instruction No. 6.040, Contributory Negligence: Burden of Proof.

In *Lawrence, 226 Va. at 412, 309 S.E.2d at 318,* the Court ruled that a patient's neglect of his health following his physician's negligent treatment may adversely affect the amount of damages but does not bar all recovery.

The Supreme Court has long recognized that an injured party has an obligation to mitigate damages. *Forbes, 269 Va. at 380, 611 S.E.2d at 595–96.*

A very young child is unable as a matter of law to mitigate damages. *Evans v. Evans, 280 Va. 76, 85, 695 S.E.2d 173, 178 (2010).*

☞ ***PRACTICE POINTER:*** See also Instructions Nos. 35.110, Patient's Duty to Mitigate Damages, and 45.550, Duty to Mitigate Damages (Contracts).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.030
## Aggravation of Pre-Existing Condition

**If you find that the plaintiff had a condition before the accident that was aggravated as a result of the accident or that the pre-existing condition made the injury he received in the accident more severe or more difficult to treat, then, [if you find your verdict for the plaintiff,] he may recover for the aggravation and for the increased severity or difficulty of treatment, but he is not entitled to recover for the pre-existing condition.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Radvany v. Davis, 262 Va. 308, 311, 551 S.E.2d 347, 348–49 (2001)*; *Bradner v. Mitchell, 234 Va. 483, 489, 362 S.E.2d 718, 722 (1987)*; *State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 271, 163 S.E.2d 181, 185 (1968)*; *Watford v. Morse, 202 Va. 605, 608, 118 S.E.2d 681, 683 (1961)*; *Ragsdale v. Jones, 202 Va. 278, 282–83, 117 S.E.2d 114, 118 (1960)*; *Safety Motor Transit Corp. v. Cunningham, 161 Va. 356, 366, 171 S.E. 432, 435 (1933).*

### PRACTICE COMMENTARY

The bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

This instruction applies when the defendant aggravates a pre-existing condition in the plaintiff but not to a case where the defendant injures the plaintiff and the injuries are then aggravated by another cause. See Instruction No. 9.040, Aggravation of Injury by Physician.

This rule is merely a restatement of the maxim that one takes the plaintiff as he finds him. Thus, "[t]he alleged tortfeasor [is] responsible for the aggravation of a pre-existing condition but not for any pre-existing disabilities." *Ragsdale, 202 Va. at 282–83, 117 S.E.2d at 118.* The defendant is not liable if the plaintiff's condition would have worsened even without the accident. *Safety Motor Transit Corp., 161 Va. at 365, 171 S.E. at 435.*

This instruction may need to be altered to fit the facts of the case. If the evidence only supports a claim of aggravation, you will need to delete references to the pre-existing condition making the injuries more severe or more difficult to treat. Similarly, the evidence may support a claim that the pre-existing condition made the injuries more difficult to treat but not a claim that it made them more severe.

☞ ***PRACTICE POINTER:*** The defendant is liable for the recurrence of a previous condition caused by the injury as well as for the aggravation of an existing condition. *State Farm Mut. Auto. Ins. Co., 209 Va. at 271, 163 S.E.2d at 185.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

**Instruction No. 9.040**
**Aggravation of Injuries by Health Care Provider**

**If you believe by the greater weight of the evidence:**

**(1) that the defendant is liable for the plaintiff's injuries;**

**(2) that the plaintiff used reasonable care in selecting a [physician; other health care provider] to treat his injuries; and**

**(3) that the treating physician [or other health care provider] made the injuries worse,**

**then the plaintiff is entitled to damages from the defendant for the increase in his injuries caused by the [physician; other health care provider].**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Smith v. Kim, 277 Va. 486, 493, 675 S.E.2d 193, 197 (2009)*; *Washington v. Williams, 215 Va. 353, 357, 210 S.E.2d 154, 157 (1974)*; *Powell v. Troland, 212 Va. 205, 210–11, 183 S.E.2d 184, 188 (1971)*; *Corbett v. Clarke, 187 Va. 222, 224–25, 46 S.E.2d 327, 328 (1948).*

### PRACTICE COMMENTARY

Whether the original tortfeasor is liable for damages caused by the subsequent injury turns on a factual determination as to whether the subsequent injury is an aggravation of the original injury or a separate and distinct injury. *Smith, 277 Va. at 493, 675 S.E.2d at 197.*

Va. Code Ann. § 8.01-581.1, *et seq.* (the Virginia Medical Malpractice Act) governs medical malpractice litigation and is applicable to any action brought for "malpractice" against a "health care provider" as those terms are defined in Va. Code Ann. § 8.01-581.1.

### *ALERTS:*

- If a plaintiff alleges separate and distinct medical malpractice injuries that do not arise out of the automobile accident, then the health care provider is not a joint tortfeasor with the driver of the automobile, and the plaintiff may not join as defendants in the same action the health care provider and the driver. *Powers v. Cherin, 249 Va. 33, 37–38, 452 S.E.2d 666, 668–69 (1995).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.050
## Property Damage: Total Loss—Diminution in Value Measure of Damages

**When personal property is totally damaged, the measure of damages is the difference in value of the property immediately before and immediately after the accident plus the necessary and reasonable expenses incurred by the plaintiff as a result of the damage to the property.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.01-66 (regarding the recovery of damages for loss of use of vehicle).

**CASE AUTHORITY:** *Averett v. Shircliff, 218 Va. 202, 207–08, 237 S.E.2d 92, 95–96 (1977)*; *Norview Cars, Inc. v. Crews, 208 Va. 148, 149, 156 S.E.2d 603, 604–05 (1967).*

### PRACTICE COMMENTARY

This is a general property damage instruction for tort cases—especially those involving motor vehicles. It does not necessarily apply in contract cases or where a statute sets a different method of computing damages, e.g., damages for cutting standing timber or treble damages for certain real property damages. See Va. Code Ann. § 55.1-2835 (regarding the loss of timber).

The Supreme Court of Virginia held in *Westlake Props., Inc.*, that the jury was properly instructed under the facts of that case that the measure of damages was the reasonable cost of repairing or replacing the property, whichever was less, plus the necessary and reasonable expenses shown by the evidence to have been incurred by the plaintiff as a result of the damage to the property. *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Assoc., Inc., 273 Va. 107, 126–27, 639 S.E.2d 257, 268–69 (2007).* For cases involving motor vehicles, see *Averett, 218 Va. at 206 n.2, 237 S.E.2d at 95 n.2*; see also *Norview Cars, 208 Va. at 149 n.1, 156 S.E.2d at 604–05 n.1.*

☞***PRACTICE POINTER:*** Va. Code Ann. § 8.01-419.1 permits the use of the National Automobile Dealers' Association ("NADA") "yellow" or "black" books or any vehicle valuation service regularly used and recognized in the automobile industry that is in effect on the relevant date to establish the fair market value of motor vehicles.

☞***PRACTICE POINTER:*** An owner of personal property may testify as to its value. *Haynes v. Glenn, 197 Va. 746, 750, 91 S.E.2d 433, 436 (1956).*

### ***ALERTS:***

In *Averett*, the Court approved an instruction that included the diminution in value rule and the cost of repair rule because there was sufficient evidence in the case from which the jury could have found either that the car was a total loss or that it was only damaged and could be restored to its former condition by repairs. *Averett, 218 Va. at 207–08, 237 S.E.2d at 95–96.* You should consider each case to determine whether the evidence will support Instruction No. 9.050 (the diminution in value rule) only, Instruction No. 9.060 (the cost of repair rule) only, or Instruction No. 9.070, which includes both the diminution in value and the cost of repair rule.

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2
Kent Sinclair, VIRGINIA REMEDIES, Chapter 3
MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.060
## Property Damage: Partial Loss—Cost of Repairs Measure of Damages

**When personal property is partially damaged, the measure of damages is the reasonable cost of repairing the property plus the amount, if any, the property depreciated due to the damage, plus the necessary and reasonable expenses incurred by the plaintiff as a result of the damage to the property, as shown by the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.01-66 (regarding the recovery of damages for loss of use of vehicle).

**CASE AUTHORITY:** *Averett v. Shircliff, 218 Va. 202, 207–08, 237 S.E.2d 92, 95–96 (1977)*; *Norview Cars, Inc. v. Crews, 208 Va. 148, 149 n.1, 156 S.E.2d 603, 604 n.1 (1967).*

### PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 9.050. This instruction applies when the property can be restored to its former condition by repairs. *Averett, 218 Va. at 207–08, 237 S.E.2d at 95–96.*

### *ALERTS:*

- In *Averett*, the Court approved an instruction that included the diminution in value rule, Instruction No. 9.050, and the cost of repair rule, this instruction, because there was sufficient evidence in the case from which the jury could have found either that the car was a total loss or that it was only damaged and could be restored to its former condition by repairs. Id. You should consider each case to determine whether the evidence will support Instruction No. 9.050 only, this instruction only, or Instruction No. 9.070, which includes both rules.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.070
## Property Damage: Partial but Disputed Loss—Measure of Damages

**Where personal property is partially damaged, the measure of damages is the difference in value of the property immediately before and immediately after the accident plus the necessary and reasonable expenses shown by the evidence to have been incurred by the plaintiff as a result of the damage. If, however, the cost of repairing the damaged property is less than the difference in value immediately before and immediately after the damage, then the measure of damages is the reasonable cost of repair with a reasonable allowance for depreciation.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.01-66 (regarding the recovery of damages for loss of use of vehicle).

**CASE AUTHORITY:** *Averett v. Shircliff, 218 Va. 202, 207–08, 237 S.E.2d 92, 95–96 (1977)*; *Norview Cars, Inc. v. Crews, 208 Va. 148, 149, 156 S.E.2d 603, 605 (1967).*

## PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 9.050. This instruction applies when there is a dispute over whether or not the property can be restored to its former condition by repairs.

### *ALERTS:*

- In *Averett*, the Court approved an instruction that included the diminution in value rule, Instruction No. 9.050, and the cost of repair rule, Instruction No. 9.060, because there was conflicting evidence in the case from which the jury could have found either that the car was a total loss or that it was only damaged and could be restored to its former condition by repairs. *Averett, 218 Va. at 207–08, 237 S.E.2d at 95–96*. You should consider each case to determine whether the evidence will support Instruction No. 9.050 only, Instruction No. 9.060 only, or this instruction, which includes both rules.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.080
## General Punitive Damages

**If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights, then you may also award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to deter him and others from acting in a similar way.**

**If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Coalson v. Canchola, 287 Va. 242, 249, 754 S.E.2d 525, 528 (2014)*; *Banks v. Mario Indus. of Va., Inc., 274 Va. 438, 460, 650 S.E.2d 687, 699 (2007)*; *Baldwin v. McConnell, 273 Va. 650, 659, 643 S.E.2d 703, 707 (2007)*; *Green v. Ingram, 269 Va. 281, 291–92, 608 S.E.2d 917, 923–24 (2005)*; *Etherton v. Doe, 268 Va. 209, 213–14, 597 S.E.2d 87, 90 (2004)*; *Doe v. Isaacs, 265 Va. 531, 535, 579 S.E.2d 174, 176 (2003)*; *Allstate Ins. Co. v. Wade, 265 Va. 383, 396, 579 S.E.2d 180, 187 (2003)*; *PGI, Inc. v. Rathe Prods., Inc., 265 Va. 334, 345–46, 576 S.E.2d 438, 444 (2003)*; *Woods v. Mendez, 265 Va. 68, 76–77, 574 S.E.2d 263, 268 (2003)*; *Smith v. Litten, 256 Va. 573, 578–79, 507 S.E.2d 77, 80 (1998)*; *Shaw v. Titan Corp., 255 Va. 535, 545, 498 S.E.2d 696, 701 (1998)*; *Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 144, 413 S.E.2d 630, 640 (1992)*; *Foreign Mission Board. of S. Baptist Convention v. Wade, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991)*; *Hack v. Nester, 241 Va. 499, 506, 404 S.E.2d 42, 45 (1990)*; *Booth v. Robertson, 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988)*; *Ford Motor Co. v. Bartholomew, 224 Va. 421, 437, 297 S.E.2d 675, 684 (1982)*; *Worrie v. Boze, 198 Va. 533, 543, 95 S.E.2d 192, 200 (1956), reh'g, 198 Va. 891, 96 S.E.2d 799 (1957)*; *Wright v. Everett, 197 Va. 608, 613–14, 90 S.E.2d 855, 855 (1956)*; *Zedd v. Jenkins, 194 Va. 704, 706–07, 74 S.E.2d 791, 793 (1953)*; *Baker v. Carrington, 138 Va. 22, 24, 120 S.E. 856, 857 (1924)*.

## Practice Commentary

***General Standards.*** The imposition of punitive damages is generally not favored. *Watson, 243 Va. at 144, 413 S.E.2d at 639*. Punitive damages serve multiple purposes. They punish the wrongdoer and protect the public by providing an example to deter others from engaging in the same or similar conduct. *Wade, 265 Va. at 391–92, 579 S.E.2d at 184*. Punitive damages do not arise out of ordinary negligence; the behavior must be willful and wanton. *Green, 269 Va. at 291–92, 608 S.E.2d at 923–24*; *Wallen v. Allen, 231 Va. 289, 297, 343 S.E.2d 73, 78 (1986)*. Where misconduct or actual malice is not shown, punitive damages may be based on "such recklessness or negligence as to evince a conscious disregard of the rights of others." *Hamilton Dev. Co. v. Broad Rock Club, Inc., 248 Va. 40, 45, 445 S.E.2d 140, 143 (1994)* (affirming punitive damages based on conscious disregard of plaintiff's property rights). Proof of a common law intentional tort permits an award of punitive damages. *Shaw, 255 Va. at 545, 498 S.E.2d at 701*. In an action for conversion, the court erred in striking plaintiff's claim for punitive damages where there was evidence upon which reasonable persons could differ regarding whether defendant's conduct was so willful and wanton as to show a conscious disregard for the rights of the plaintiff. *PGI, Inc., 265 Va. at 346, 576 S.E.2d at 444*; see also *Etherton, 268 Va. at 212–14, 597 S.E.2d at 89–90*.

Generally, a finding of pecuniary harm, and thus compensatory damages, is a prerequisite to awarding punitive damages. *Syed v. ZH Techs., Inc., 280 Va. 58, 74–75, 694 S.E.2d 625, 634 (2010)*; *Watson v. Avon St. Bus. Center, Inc., 226 Va.*

*614, 619, 311 S.E.2d 795, 799 (1984)*; *Gasque v. Mooers Motor Car Co., 227 Va. 154, 159, 313 S.E.2d 384, 388 (1984)*; *O'Brien v. Snow, 215 Va. 403, 405, 210 S.E.2d 165, 167 (1974)*. However, punitive damages can be awarded in defamation per se cases without compensatory damages. *Newspaper Publ'g Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976)*.

Punitive damages are not awarded as a matter of right; if the evidence tends to establish defendant's malice, plaintiff is entitled to this instruction. It is, however, within the jury's discretion whether to award punitive damages. *Weatherford v. Birchett, 158 Va. 741, 747, 164 S.E. 535, 537 (1932)*.

Punitive damages are recoverable only where the plaintiff has made an express demand for them in the prayer for relief or ad damnum clause sufficient to put the defendant on notice that an award of punitive damages is sought apart from, and in addition to, the compensatory damages claimed. *Harrell v. Woodson, 233 Va. 117, 120–21, 353 S.E.2d 770, 772 (1987)*.

***Actual Malice/Willful and Wanton Conduct.*** The definition of common law actual malice is given in Instruction No. 9.090, Punitive Damages: Definition of Common Law Actual Malice. The term "willful and wanton" is defined in Instruction No. 4.040, Definition of Willful and Wanton Conduct.

***Defamation.*** This instruction is not applicable to defamation cases. In defamation cases, plaintiff has the burden of proving malice by clear and convincing evidence. *Jackson v. Hartig, 274 Va. 219, 229, 645 S.E.2d 303, 308 (2007)*; *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 152, 334 S.E.2d 846, 853 (1985)*. Malice in such cases means either that the defendant knew the statements he made were false at the time he made them or that he made them with a reckless disregard for their truth. *Gov't Micro Res., Inc. v. Jackson, 271 Va. 29, 42, 624 S.E.2d 63, 70 (2006)*. Instructions No. 37.110, Punitive Damages (Defamatory *Per Se*) and 37.111, Punitive Damages (Not Defamatory *Per Se*) are the appropriate punitive damage instructions to use in defamation cases.

***Wrongful Death and Survival Actions.*** Punitive damages are recoverable in a wrongful death action. See Va. Code Ann. § 8.01-52; Instruction No. 9.105, Punitive Damages: Death by Wrongful Act. A plaintiff may recover punitive damages, if appropriate, in survival actions where the plaintiff died of unrelated causes before or after commencing the action. *Worrie, 198 Va. at 536–37, 95 S.E.2d at 195–96*; Va. Code Ann. § 8.01-25. They may not, however, be recovered against the defendant's personal representative. *Dalton v. Johnson, 204 Va. 102, 107, 129 S.E.2d 647, 651 (1963)*.

***Master and Servant.*** A plaintiff may not recover punitive damages against a master or principal for the acts of his servant or agent unless the plaintiff proves that the act was done in the scope of employment, with either actual or implied malice, and that the principal either expressly authorized, subsequently ratified, or participated in the act. *Hogg v. Plant, 145 Va. 175, 180–81, 133 S.E. 759, 760–61 (1926)*; see also Chapter 8, Agency, Employment and Similar Relationships.

***Corporations and Punitive Damages.*** A corporate employer can only be subjected to punitive damages on the basis that the corporation itself committed wrongful acts if the employee who committed the wrongful acts is in a sufficiently high position in the corporate structure. Whether or not an employer is sufficiently high in the corporate structure is a fact-sensitive question. *Egan v. Butler, 290 Va. 62, 75–76, 772 S.E.2d 765, 773 (2015).*

***Contract Actions.*** Punitive damages are not awardable for a simple breach of contract, even if an ulterior motive underlies the breach, unless the plaintiff proves that ulterior motive amounts to "an independent, willful tort, beyond the mere breach of a duty imposed by contract." *Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983)*; *Gasque, 227 Va. at 159, 313 S.E.2d at 388.* Since no election between tort and contract is required, pursuant to Va. Code Ann. § 8.01-272, a party seeking punitive damages should allege a willful, independent tort in a count separate from that which alleges a breach of contract. *Kamlar Corp., 224 Va. at 707, 299 S.E.2d at 518.*

***Intoxication.*** Intoxication is relevant to a determination of the degree of the defendant's negligence and may serve to elevate his conduct to a level of negligence so gross, wanton, and culpable as to show a reckless disregard of human life. *Woods, 265 Va. at 77, 574 S.E.2d at 267*; *Doe v. Isaacs, 265 Va. 531, 536–38, 579 S.E.2d 174, 177–78 (2003)*; *Wade, 265 Va. at 396, 579 S.E.2d at 187*; *Huffman v. Love, 245 Va. 311, 315, 427 S.E.2d 357, 360 (1993)*; *Puent v. Dickens, 245 Va. 217, 219–20, 427 S.E.2d 340, 342 (1993)*; *Zedd v. Jenkins, 194 Va. 704, 709, 74 S.E.2d 791, 793 (1953).* See Instruction No. 15.005, Punitive Damages: Intoxicated Driver, which covers the statutory basis for an award of punitive damages for persons injured by certain intoxicated drivers. See also *Webb v. Rivers, 256 Va. 460, 464, 507 S.E.2d 360, 363 (1998)*; Va. Code Ann. § 8.01-44.5.

For a discussion of the criteria for judicial review of the amount of punitive damages on a motion for remittitur, see *Coalson, 287 Va. at 248–51, 754 S.E.2d at 528–29*; *Baldwin, 273 Va. at 656–58, 643 S.E.2d at 706–07*; *Poulston v. Rock, 251 Va. 254, 262–63, 467 S.E.2d 479, 484 (1996)*

☞ ***PRACTICE POINTER:*** See Instruction No. 4.040, Definition of Willful and Wanton Conduct, and Instruction No. 9.090, Punitive Damages: Definition of Common Law Actual Malice.

☞ ***PRACTICE POINTER:*** The jury may hear and consider evidence of the defendant's financial standing in determining the amount of punitive damages. *Smith, 256 Va. at 578, 507 S.E.2d at 80*; *Hamilton Dev. Co., 248 Va. at 44, 445 S.E.2d at 143*; *Weatherford, 158 Va. at 747, 164 S.E. at 537.*

**ALERTS:**

- This punitive damage instruction should be used only in cases involving personal injury (including assault and battery). Please consult the instructions on false imprisonment, fraud, defamation and malicious prosecution for instructions peculiar to those torts.

- It is reversible error to instruct the jury that they "must" find punitive damages. *Turk v. Martin, 124 Va. 103, 111–13, 97 S.E. 351, 353–54 (1918).* It may be reversible error to instruct that the plaintiff is "entitled to" punitive damages or that the jury "should" or "ought to" award them. *Id.* Conversely, in *Cain v. Lee, 290 Va. 129, 135–36, 772 S.E.2d 894, 897 (2015)*, the court reversed and remanded when the jury was instructed that punitive damages are generally disfavored because it was logical to assume that the jury, upon hearing that instruction, decreased damages as a result.

- Va. Code Ann. § 8.01-38.1 provides a $350,000 ceiling for a punitive damages award against all defendants; this statute applies "[i]n any action accruing on or after July 1, 1988" and specifies that "[t]he jury shall not be advised of the limitation prescribed by this section." *Id.* In *Wackenhut Applied Techs. Ctr., Inc. v. Sygnetron Prot. Sys., Inc., 979 F.2d 980, 983–85 (4th Cir. 1992)*, the United States Court of Appeals for the Fourth Circuit held that Va. Code Ann. § 8.01-38.1 is not limited to unintentional tort actions. The court in *Wackenhut* also found that the statute did not violate the due process clauses of the United States and Virginia constitutions. *Id. at 985.*

- An award of punitive damages that is "grossly excessive" violates the due process clause. *BMW of N. Am. v. Gore, 517 U.S. 559, 585–86 (1996).* Accordingly, certain procedural safeguards are necessary to cabin a jury's discretionary authority. The Supreme Court of the United States, in *Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18–20 (1991)*, upheld Alabama's scheme for awarding punitive damages, noting that in Alabama a jury must: (1) be instructed to "take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong," (2) be told of punitive damages' nature and purpose, and (3) be informed that imposition of punitive damages is discretionary and not compulsory. In addition, a trial court must review the punitive damages award for excessiveness and state on the record its reason for interfering with the jury verdict or its reason for not doing so. The Supreme Court approved the Alabama Supreme Court's review criteria: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from defendant's conduct as well as harm that actually occurred; (b) degree of reprehensibility of defendant's conduct, duration of that conduct, defendant's awareness, concealment, and existence and frequency of similar past conduct; (c) profitability to defendant of the wrongful conduct and desirability of removing that profit and having defendant sustain a loss; (d) the financial position of defendant; (e) the costs of litigation; (f) imposition of criminal sanctions, to be taken in mitigation; and (g) existence of other civil awards against the defendant, these also to be taken in mitigation. *Id. at 21–22*; see also *Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007).*

In *Johnson v. Hugo's Skateway, 974 F.2d 1408, 1410–11 (4th Cir. 1992)*, the Fourth Circuit remanded for a new trial on punitive damages. The Court stated that Virginia law contemplates punitive damages that are proportional to compensatory damages and that Virginia courts have applied *Haslip* factors to reverse awards of

excessive punitive damages. *Id.* at 1418. The court cited its analysis of *Haslip* in *Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991)*, which recommends that an instruction on punitive damages address (1) relationship to harm caused; (2) other penalties for the conduct; (3) improper profits and plaintiff's costs; and (4) limitation based on ability to pay. The suggested language on each aspect is:

(1) Relationship to harm caused: Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus, any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.

(2) Other penalties for the conduct: Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.

(3) Improper profits and plaintiff's costs: The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.

(4) Limitation based on ability to pay: Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

*Mattison, 947 F.2d at 110 (4th Cir. 1991).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.090
## Punitive Damages: Definition of Common Law Actual Malice

**"Actual malice" is a sinister or corrupt motive such as hatred, personal spite, ill will, or a desire to injure the plaintiff.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Baldwin v. McConnell, 273 Va. 650, 659–60, 643 S.E.2d 703, 707–08 (2007)*; *Banks v. Mario Indus. of Va., Inc., 274 Va. 438, 460, 650 S.E.2d 687, 699 (2007)*; *F.B.C. Stores v. Duncan, 214 Va. 246, 252, 198 S.E.2d 595, 600 (1973)*; *Giant of Va., Inc. v. Pigg, 207 Va. 679, 685–86, 152 S.E.2d 271, 277 (1967)*; *Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186, 187 (1936).*

### PRACTICE COMMENTARY

This instruction states the common law definition of actual malice. For a discussion of malice in defamation cases, see Chapter 37, Defamation. There are statutory grounds for awarding punitive damages against certain intoxicated drivers. Va. Code Ann. § 8.01-44.5. See Instruction No. 15.005, Punitive Damages: Intoxicated Driver.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 14

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 23

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.1 through 2.36; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapter 3

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93

## Instruction No. 9.100
## Damages: Death by Wrongful Act

**[If you find your verdict for the plaintiff, then, in] [In] determining the damages to which he is entitled, you shall include, but are not limited to, any of the following which you believe by the greater weight of the evidence were suffered by the beneficiaries and caused by the defendant's negligence:**

**(1) any sorrow, mental anguish, and loss of solace suffered by the beneficiaries. Solace may include society, companionship, comfort, guidance, kindly offices, and advice of the decedent;**

**(2) any reasonably expected loss in income of the decedent suffered by the beneficiaries;**

**(3) any reasonably expected loss of services, protection, care, and assistance which the decedent provided to the beneficiaries;**

**(4) any expenses for the care, treatment, and hospitalization of the decedent incident to the injury resulting in his death; and**

**(5) reasonable funeral expenses.**

**If you award damages under paragraphs (1), (2), and (3) above, you may distribute these damages** [among; between] (name of spouse, children, and children of any deceased child of decedent) **or** (names of surviving statutory beneficiaries)**.**

**If you award damages under (4) and (5) above, you shall specifically state the amount of damages for each.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 8.01-52–8.01-54.

**Case Authority:** *Wright v. Minnicks, 275 Va. 579, 584–85, 659 S.E.2d 276, 279 (2008)*; *Vasquez v. Mabini, 269 Va. 155, 160–61, 606 S.E.2d 809, 811–12 (2005)*; *Rice v. Charles, 260 Va. 157, 169, 532 S.E.2d 318, 325 (2000)*; *Johnson v. Smith, 241 Va. 396, 400–01, 403 S.E.2d 685, 687 (1991)*; *Marshall v. Goughnour, 221 Va. 265, 272, 269 S.E.2d 801, 806 (1980)*; *Cassady v. Martin, 220 Va. 1093, 1101, 266 S.E.2d 104, 108 (1980).*

## Practice Commentary

The first bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

***General Principles.*** "The object of the [wrongful death] statute is to compensate these beneficiaries for their loss occasioned by the decedent's death." *Cassady, 220 Va. at 1101, 266 S.E.2d at 108.* The damages provisions of Va. Code Ann. § 8.01-52 require proof of loss by the statutory beneficiary; dependency is not a prerequisite. *Marshall, 221 Va. at 272, 269 S.E.2d at 806.* Whether or not a decedent's relative meets the statutory requirements of Va. Code Ann. § 8.01-53(A) is a jury question. *Mann v. Hinton, 249 Va. 555, 564, 457 S.E.2d 22, 27–28 (1995).*

The judge will normally leave the amount of the jury award untouched unless it is clearly motivated by passion, prejudice, or corruption. *Matthews v. Hicks, 197 Va. 112, 119, 87 S.E.2d 629, 633 (1955).* A verdict that contains no award for solace and loss of services may or may not be inadequate depending on the evidence presented. *Wright, 275 Va. at 584, 659 S.E.2d at 279*; see also *Rice, 260 Va. at 169, 532 S.E.2d at 325* (holding that a jury verdict for the exact amount of funeral expenses was inadequate as a matter of law because it failed to compensate the decedent's statutory beneficiaries for any other items of damage); *Johnson, 241 Va. at 400–01, 403 S.E.2d at 687.*

Expenses for the decedent's final care, treatment, and hospitalization and his funeral expenses shall be apportioned pro rata among the creditors as their respective interests may appear. Va. Code Ann. § 8.01-52.

Sorrow, mental anguish, and loss of society (consortium) may be inferred from the fact of death, even absent direct proof. *Gamble v. Hill, 208 Va. 171, 179–80, 156 S.E.2d 888, 894 (1967).*

Pecuniary loss may be shown directly by evidence of decedent's employment and wages or services rendered to the family; expert testimony on these matters must be admitted if otherwise proper. Va. Code Ann. § 8.01-52; *Pugh v. Yearout, 212 Va. 591, 595, 186 S.E.2d 58, 62 (1972).* Expert testimony founded upon assumptions that have no basis in fact is inadmissible. *Vasquez, 269 Va. at 160, 606 S.E.2d at 811.* Additionally, see *Cassady, 220 Va. at 1100–01, 266 S.E.2d at 108*, where the Court ruled that evidence as to reasonably expected loss of a mentally disabled, functionally illiterate 21-year-old decedent's income was inadmissible as

a matter of law as being too speculative. See also *Howell v. Cahoon, 236 Va. 3, 8, 372 S.E.2d 363, 365 (1988).*

***Beneficiaries.*** "Children" includes illegitimate and after-born children. *Carroll v. Sneed, 211 Va. 640, 644, 179 S.E.2d 620, 623 (1971)*; *Withrow v. Edwards, 181 Va. 344, 355, 25 S.E.2d 343, 349 (1943)*; *Chick Transit Corp. v. Edenton, 170 Va. 361, 368, 196 S.E. 648, 651 (1938).* "Brothers and sisters" include brothers and sisters of the half blood. *Wolfe v. Lockhart, 195 Va. 479, 487, 78 S.E.2d 654, 659 (1953).* The fact that a beneficiary may not be able to take as an heir or distributee under statutes of descent and distribution is not necessarily grounds for exclusion as a beneficiary under Va. Code Ann. § 8.01-53; *Carroll, 211 Va. at 642–44, 179 S.E.2d at 622–23*; *Withrow, 181 Va. at 356, 25 S.E.2d at 349.*

A beneficiary under Va. Code Ann. § 8.01-53 includes "any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent". For the purposes of this section, a "relative" is "any person related to the decedent by blood, marriage or adoption [including] a stepchild of the decedent." *Id.* However, a parent whose parental rights and responsibilities have been terminated by a court of competent jurisdiction or pursuant to a permanent entrustment agreement with a child welfare agency is not eligible as a beneficiary under Va. Code Ann. § 8.01-53(A).

A beneficiary may renounce his interest in any claim brought pursuant to Va. Code Ann. § 8.01-50 and, in such event, the damages shall be distributed to the beneficiaries in the same class as the renouncing beneficiary or, if there are none, to the beneficiaries in any subsequent class in the order of priority set forth in Va. Code Ann. § 8.01-53(A); see also Va. Code Ann. § 8.01-53(C).

Beneficiaries are determined at the time of the award and not at the time of death. *Knodel v. Dickerman, 246 Va. 124, 128, 431 S.E.2d 323, 325 (1993).*

☞ ***PRACTICE POINTER:*** In an action for wrongful death, a charity is not immune for acts or omissions of gross negligence and willful conduct. *Cowan v. Hospice Support Care, Inc., 268 Va. 482, 488–89, 603 S.E.2d 916, 919–20 (2004).*

☞ ***PRACTICE POINTER:*** Punitive damages are recoverable in a death by wrongful act case. Va. Code Ann. § 8.01-52. See Instruction No. 9.105, Punitive Damages: Death by Wrongful Act.

☞ ***PRACTICE POINTER:*** In cases involving a claim for wrongful death as well as an alternate survival claim for personal injuries sustained prior to death, both of which allegedly arose from the same acts of medical negligence, the plaintiff is required to elect between the personal injury survival claim and the wrongful death claim only when the record sufficiently establishes that the personal injuries and the death arose from the same cause. *Green v. Diagnostic Imaging Associates, P.C., 299 Va. 1, 12–13, 843 S.E.2d 371, 377–78 (2020)*; *Centra Health, Inc. v. Mullins, 277 Va. 59, 79, 670 S.E.2d 708, 718 (2009).*

**ALERTS:**

- It is reversible error to limit this instruction in favor of less than all members

of the applicable class, absent renunciation by a member of the class. *Wolfe, 195 Va. at 487–88, 78 S.E.2d at 659.*

- In a case where there is any doubt as to when compelling an election between a survival claim and a wrongful death claim would be proper, bifurcation into separate proceedings to determine liability and damages may be the most practical means to obviate potential prejudice. *Mullins, 277 Va. at 78, 670 S.E.2d at 718.* The decision to bifurcate lies within the trial court's discretion. *Id.*

- Either party may request that the jury be instructed to specify the distribution of the award, if any. Va. Code Ann. § 8.01-54(B). Upon the failure of the jury to specify the distribution, the court must do so and enter judgment accordingly. *Id.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14, & 15

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 23 & 25

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.11; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapters 3 & 33

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93; Death By Wrongful Act §§ 1 through 19

## Instruction No. 9.105
## Punitive Damages: Death by Wrongful Act

**[If you find your verdict for the plaintiff, and if] [If] you believe by the greater weight of the evidence that the defendant's conduct was willful or wanton or was so reckless as to evince a conscious disregard for the safety of others, then you may also award punitive damages to the plaintiff to punish the defendant for his conduct and to prevent others from acting in a similar way.**

**If you award punitive damages, you must state separately in your verdict the amount you allow as punitive damages, and you may distribute these damages** [among; between] (names of spouse, children, and children of any deceased child of decedent) **or** (names of surviving statutory beneficiaries)**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-52(5).

**CASE AUTHORITY:** *Curtis v. Highfill, 298 Va. 499, 507, 840 S.E.2d 321, 324 (2020)*; *Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 144, 413 S.E.2d 630, 640 (1992).*

### PRACTICE COMMENTARY

The first bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

Punitive damages are recoverable in a death by wrongful act case upon proof that the defendant's conduct was willful or wanton, or so reckless as to evince a conscious disregard for the safety of others. Va. Code Ann. § 8.01-52(5); *Curtis, 298 Va. at 505, 840 S.E.2d at 324*; *Owens-Corning Fiberglas Corp., 243 Va. at 144, 413 S.E.2d at 640.* Ill will is not a necessary element of willful and wanton conduct. *Curtis, 298 Va. at 506, 840 S.E.2d at 324.* Instructing a jury that punitive damages are disfavored in Virginia is reversible error. *Cain v. Lee, 290 Va. 129, 134–35, 772 S.E.2d 894, 896–97 (2015).* Punitive damages are recoverable from intoxicated drivers under Va. Code Ann. § 8.01-44.5. See Instruction No. 15.005, Punitive Damages: Intoxicated Driver.

☞ ***PRACTICE POINTER:*** The jury, or the court if there is no jury, must specifically state the amount of any punitive damages awarded. Va. Code Ann. § 8.01-52.

### *ALERTS:*

- Regarding due process requirements for jury instructions on punitive damages, review the Alert in Instruction 9.080, General Punitive Damages.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14, & 15

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 23 & 25

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.11; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapters 3 & 33

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93; Death By Wrongful Act §§ 1 through 19

## Instruction No. 9.110
## Contributory Negligence of Beneficiary: Death by Wrongful Act

**[If you find your verdict for the plaintiff, and if] [If] you believe by the greater weight of the evidence that** (name of spouse; child; grandchild; parent; brother; sister) **failed to use ordinary care for the safety of the decedent, then** (name of spouse, etc.) **was negligent. If you further believe by the greater weight of the evidence that this negligence was a proximate cause of the decedent's death, then** (name of spouse, etc.) **cannot share in the distribution of the damages that you award.**

**Even if you find that** (name of spouse, etc.) **cannot share in the distribution of the damages, you may award damages to** (names of remaining beneficiaries in the class)**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Chapman v. City of Virginia Beach, 252 Va. 186, 193, 475 S.E.2d 798, 802–03 (1996)*; *P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 971–72, 41 S.E.2d 1, 4 (1947)*; *City of Danville v. Howard, 156 Va. 32, 37–39, 157 S.E. 733, 73–35 (1931)*; *Williams v. Lynchburg Traction & Light Co., 142 Va. 425, 430–31, 128 S.E. 732, 733–34 (1925)*; *Ratcliffe v. McDonald, 123 Va. 781, 785–86, 97 S.E. 307, 308 (1918).*

### PRACTICE COMMENTARY

The first bracketed language should be omitted when liability either has been admitted or has been found by the court as a matter of law.

The contributory negligence of one of the beneficiaries in a class only defeats that beneficiary's recovery. It has no effect on the recovery of the other beneficiaries. In *City of Danville,* recovery of $5,000 divided equally between mother and contributorily negligent father was not set aside; a judgment was entered for $2,500 for mother because the negligence of one parent is not imputed to the other. *156 Va. at 38–39, 157 S.E.2d at 735.*

☞***PRACTICE POINTER:*** See Instructions No. 6.005, Child Under Seven Incapable of Contributory Negligence, 6.020, Negligence of Child of Seven Years Old or Older But Less Than Fourteen, and 6.030, Standard of Conduct for Minor of Fourteen years Old or Older But Less Than Eighteen, regarding a child's ability to be contributorily negligent.

### *ALERTS:*

- There are no cases that state what the result is if the sole beneficiary in the first class is precluded from recovering damages by his contributory negligence. The beneficiaries in the second class might also be precluded from recovering. The only decided cases are ones where a parent is a beneficiary and his or her child dies.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14, & 15

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 23 & 25

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.11; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapters 3 & 33

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93; Death By Wrongful Act §§ 1 through 19

## Instruction No. 9.120
## Life Expectancy/Mortality Table

**You should consider the life expectancy figure introduced as evidence along with any other evidence relating to the health, constitution, and habits of** (name of plaintiff; decedent) **in determining his life expectancy.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-419.

**CASE AUTHORITY:** *Poliquin v. Daniels, 254 Va. 51, 58–59, 486 S.E.2d 530, 535 (1997)*; *Graddy v. Hatchett, 233 Va. 65, 70–71, 353 S.E.2d 741, 744–45 (1987)*; *Edwards v. Syrkes, 211 Va. 600, 602, 179 S.E.2d 902, 903–04 (1971).*

### PRACTICE COMMENTARY

Va. Code Ann. § 8.01-52 permits recovery of beneficiaries' loss of society, companionship, comfort, guidance, advice, services, protection, care, and assistance provided by the decedent. Where such items of loss are supported by the evidence, the life expectancy table is admissible. *Graddy, 233 Va. at 70–71, 353 S.E.2d at 744–45.* It is not essential to prove life expectancy with a mortality table. *Eisenhower v. Jeter, 205 Va. 159, 164, 135 S.E.2d 786, 789 (1964).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14, 15

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 23 & 25

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.11; 3.2

Kent Sinclair, VIRGINIA REMEDIES, Chapters 3 & 33

MICHIE'S JURISPRUDENCE, Damages §§ 1 through 93; Death By Wrongful Act §§ 1 through 19

# Chapter 10

# MOTOR VEHICLES—OPERATION

## Scope Note


Instruction No. 10.000 Lookout; Control; Speed

Instruction No. 10.004 Duty of Driver Following Another Vehicle

Instruction No. 10.005 Rear-End Collision: Finding Instruction

Instruction No. 10.010 Right to Assume Other Driver's Ordinary Care

Instruction No. 10.020 Lookout: Scope of Duty to Keep a Proper Lookout

Instruction No. 10.025 Lookout: Duty to Keep Windows Clear

Instruction No. 10.030 Lookout: When Lights to Be Lighted

Instruction No. 10.040 Control: Skidding

Instruction No. 10.050 Control: Continuous Driving Over 13 Hours

Instruction No. 10.060 Control: Falling Asleep

Instruction No. 10.070 Control: Brake Requirements

Instruction No. 10.080 Speed: Exceeding Posted Limit

Instruction No. 10.090 Speed: Posted Minimum Speed

Instruction No. 10.100 Speed: Driving Too Slowly

Instruction No. 10.105 Speed: Table of Speed and Stopping Distances

Instruction No. 10.110 Duty to Drive on the Right

Instruction No. 10.115 Defendant in Plaintiff's Lane of Travel

Instruction No. 10.120 Proper Lane for Slow-Moving Vehicle on Multiple-Lane Road

Instruction No. 10.130 Duty to Drive on Half of the Road

Instruction No. 10.140 Duty to Heed Lane Markings

Instruction No. 10.150 Three-Lane Roads

Instruction No. 10.160 Changing Lanes

Instruction No. 10.170 Overtaking and Passing: Visibility

Instruction No. 10.180 Overtaking and Passing: Clearance

Instruction No. 10.190 Stopping and Turning: Duty to Signal

Instruction No. 10.200 Turn or Stop Signal

Instruction No. 10.210 Changing Course After Signaling

Instruction No. 10.230 Right Turn: Driver's Duty

Instruction No. 10.240 Driver's Duty When Turning Left; Yielding Right-of-Way

**Instruction No. 10.250 Driver's Duty on Left Turn From a Two-Way Road**

**Instruction No. 10.260 Driver's Duty on Left Turn on Other Than Two-Way Roadways**

**Instruction No. 10.262 Steady Red Light**

**Instruction No. 10.264 Green Light**

**Instruction No. 10.266 Steady Amber Light**

**Instruction No. 10.268 Right Turn on Steady Red Light**

**Instruction No. 10.270 Stop Sign: Yielding Right-of-Way**

**Instruction No. 10.280 Yield Sign at Intersection: Yielding Right-of-Way**

**Instruction No. 10.290 Uncontrolled Intersection: Yielding Right-of-Way**

**Instruction No. 10.295 Unlawful Speed: Forfeiture of Right-of-Way**

**Instruction No. 10.300 Right-of-Way: Stopping and Yielding Before Entering Highway or Crossing Sidewalk**

**Instruction No. 10.310 Right-of-Way: Traffic Circles**

**Instruction No. 10.320 Driver's Duty Not to Stop on Highway**

**Instruction No. 10.330 Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway**

**Instruction No. 10.340 Driver's Duty When Stopping to Sell Merchandise**

**Instruction No. 10.350 Driver's Duty When Stopping on Highway Because of Accident**

**Instruction No. 10.360 Certain Stopped Vehicles; Duty to Set Out Warning Devices**

# SCOPE NOTE

The following instructions concern the duties of a driver while operating a motor vehicle—what are commonly called the rules of the road. The instructions reflect both statutory and common law duties. These instructions can be used to describe negligence, contributory negligence, or both. These instructions do not address the Federal Motor Carrier Safety Regulations, which are incorporated into Virginia law. 49 C.F.R. 390.1 et seq.; 19 V.A.C. 30-20-40; 19 V.A.C. 30-20-80. See, e.g., 49 C.F.R. § 392.14 (1995); *Kimberlin v. PM Transp., Inc., 264 Va. 261, 267–68, 563 S.E.2d 665, 668 (2002)*. Other chapters on motor vehicles deal with special negligence doctrines: sudden and medical emergency, negligent entrustment and last clear chance (Chapter 7), emergency vehicles (Chapter 11), school buses (Chapter 12), passengers (Chapter 13), pedestrians (Chapter 14), intoxicated drivers (Chapter 15), uninsured motorists (Chapter 16), equipment (Chapter 17), accidents at railroad crossings (Chapter 18), and streets, sidewalks and bridges (Chapter 32). At the end of this scope note, there is a discussion of the concept of negligence per se.

The instructions in this Chapter cover many of the most commonly encountered duties associated with operating motor vehicles. Chapters 11 through 18 cover other specific circumstances and issues associated with motor vehicles. Common carrier duties, which often involve motor vehicles, are covered in Chapter 22. Except for the common law duties to use ordinary care given in Instruction No. 10.000 and Instruction No. 10.010, and their related instructions, the instructions in this Chapter are based on duties defined in Title 46.2 of the Va. Code. Generally, the language of the controlling statute is used in the instruction. However, exceptions were made where the statutory language could be simplified.

The Scope Notes to Chapter 4 (Negligence) and Chapter 17 (Motor Vehicles—Equipment) contain helpful discussions of the doctrines of negligence and negligence per se. In general, negligence is the failure to use ordinary care in performing some duty. *RGR, LLC v. Settle, 288 Va. 260, 764 S.E.2d 8, 16 (2014)*. Negligence per se, in contrast, is the failure to perform some act that has been adopted by the legislature as the standard of conduct of a reasonable person. *Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011)*.

The Supreme Court has held that the violation of certain statutes is negligence per se, while the violation of other statutes is negligence only if the violation resulted from the driver's failure to use ordinary care. The instructions in this Chapter attempt to maintain that distinction.

Where the duty is absolute, the instruction reads in absolute terms:

> The maximum speed at the time and place of the collision was 55 miles per hour. If the defendant was driving his vehicle faster than this limit, then he was negligent.

Where the duty depends on the driver's failure to use ordinary care, the instruction reflects that:

> A driver of a vehicle has a duty to use ordinary care to keep his windows clear so that he can keep a proper lookout.

If a driver fails to perform this duty, then he is negligent.

Where the Supreme Court has not specified whether the duty is absolute or depends upon the absence of ordinary care, the instruction has been drafted in the language that the Court used.

The driver of a vehicle has a duty to make his right turn as close as practicable to the right curb.

If a driver fails to perform this duty, then he is negligent.

**Instruction No. 10.000**
**Lookout; Control; Speed**

**The driver of a vehicle has a duty to use ordinary care:**

**(1) to keep a proper lookout;**

**(2) to keep his vehicle under proper control; and**

**(3) to operate his vehicle at a reasonable speed under the existing conditions.**

**If a driver fails to perform any one or more of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-853 (control); Va. Code Ann. § 46.2-861 (excessive speed); Va. Code Ann. § 46.2-877 (slow speed).

**CASE AUTHORITY:** *Burroughs v. Keffer, 272 Va. 162, 168, 630 S.E.2d 297, 301 (2006)* (lookout); *Faison v. Hudson, 243 Va. 397, 407, 417 S.E.2d 305, 310–11 (1992)* (reasonable speed under existing conditions); *West v. Critzer, 238 Va. 356, 359–60, 383 S.E.2d 726, 728 (1989)* (lookout, speed); *Reams v. Doe, 236 Va. 237, 239, 372 S.E.2d 405, 406–07 (1988)* (lookout); *Litchford v. Hancock, 232 Va. 496, 499–500, 352 S.E.2d 335, 337 (1987)* (lookout, control); *Virginia & Md. R.R. v. White, 228 Va. 140, 146–47, 319 S.E.2d 755, 759 (1984)* (lookout, control); *Meeks v. Hodges, 226 Va. 106, 109, 306 S.E.2d 879, 881 (1983)* (control); *Todt v. Shaw, 223 Va. 123, 127 n.1, 286 S.E.2d 211, 213–14 n.1 (1982)* (lookout, control, speed); *Voight v. Reber, 187 Va. 157, 163–64, 46 S.E.2d 15, 19 (1948)* (lookout, control).

## PRACTICE COMMENTARY

Keeping a proper lookout is discussed in three other instructions. Instruction No. 10.020 defines the scope of the duty to keep a proper lookout. Instruction No. 10.025 states the duty to use ordinary care to keep one's windows clear, and Instruction No. 10.030 states when headlights and taillights must be on.

Control is discussed in four instructions. Instruction Nos. 10.040, 10.050, and 10.060 discuss skidding, continuous driving for more than 13 hours, and falling asleep. Instruction No. 10.070 states the duty not to drive with improperly adjusted brakes.

An instruction requiring a driver to keep his vehicle under complete control at all times under every condition is erroneous because no person can keep a moving vehicle under complete control when so many unforeseen conditions can suddenly present themselves. *Gale v. Wilber, 163 Va. 211, 221, 175 S.E. 739, 742–43 (1934).*

Proper control is statutory language; it is not error so to instruct the jury. "Proper" means the degree of control which is appropriate, suitable or reasonable under the existing conditions. *Voight, 187 Va. at 164, 46 S.E.2d at 19.*

Speed is the subject of three instructions: Instruction Nos. 10.080, 10.090 and 10.100 state the duty not to exceed the posted limit, not to go slower than a posted minimum, and not to drive too slowly. Instruction No. 10.105 includes the statutory table of speed and stopping distances.

☞ ***PRACTICE POINTER:*** A reasonable speed is governed by existing conditions and not necessarily by the posted speed limit. *Kimberlin v. PM Transp., Inc., 264 Va. 261, 267, 563 S.E.2d 665, 668 (2002).*

The age of a vehicle driver will not alter the standard of care to be exercised by such driver. Reasonable care is not measured by the driver's age or ability. The conduct of minors and adults is judged according to the degree of care that a reasonably prudent person would exercise under the same or similar circumstances.

*Thomas v. Settle, 247 Va. 15, 21, 439 S.E.2d 360, 364 (1994).*

***ALERTS:***

- Subparagraph (3) on speed differs somewhat in language from the statutes on which it is based, which include Va. Code Ann. § 46.2-861 (driving too fast for highway and traffic conditions) and Va. Code Ann. § 46.2-877 (minimum speed limits).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.004
## Duty of Driver Following Another Vehicle

**The driver of a motor vehicle shall not follow another** [vehicle; trailer; semitrailer] **more closely than is reasonable and prudent, having due regard to the speed of both vehicles and the traffic on, and conditions of, the highway at the time.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-816.

**CASE AUTHORITY:** *Hot Shot Express, Inc. v. Brooks, 264 Va. 126, 139, 563 S.E.2d 764, 771 (2002)*; *Garnot v. Johnson, 239 Va. 81, 84–85, 387 S.E.2d 473, 475 (1990)*; *Meeks v. Hodges, 226 Va. 106, 109, 306 S.E.2d 879, 881 (1983)*; *Clifton v. Gregory, 212 Va. 859, 862, 188 S.E.2d 203, 206 (1972)*; *Maroulis v. Elliott, 207 Va. 503, 509–10, 151 S.E.2d 339, 344 (1966)*; *Elswick v. Collins, 194 Va. 292, 298–99, 72 S.E.2d 626, 629–30 (1952)*.

### PRACTICE COMMENTARY

One of the reasons for requiring a driver to maintain a reasonable and prudent distance between his vehicle and a vehicle in front of him is the likelihood that the vehicle in front may stop suddenly. See *Maroulis, 207 Va. at 509–10, 151 S.E.2d at 344*. What constitutes a reasonable and prudent distance depends upon the particular facts involved in each instance. See *Elswick, 194 Va. at 298–99, 72 S.E.2d. at 630*; *Clifton, 212 Va. at 862, 188 S.E.2d at 206*. When reasonable minds can differ as to what constitutes a reasonable and prudent distance under the circumstances, the question becomes a jury issue. *Clifton, 212 Va. at 862, 188 S.E.2d at 206*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.005
## Rear-End Collision: Finding Instruction

**If** (name of plaintiff)**'s vehicle was lawfully** [stopped; stopping; coming to a stop] **in its lane of travel and was struck from the rear, you may find that** (name of defendant) **was negligent unless you believe from other evidence that** (name of defendant) **was not negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Edlow v. Arnold, 243 Va. 345, 349–50, 415 S.E.2d 436, 438–39 (1992)*; *Garnot v. Johnson, 239 Va. 81, 84–85, 387 S.E.2d 473, 475 (1990)*; *Weems v. Blalock, 226 Va. 304, 305–06, 309 S.E.2d 302, 303 (1983)*; *Wells v. McMahon, 223 Va. 192, 195–96, 288 S.E.2d 439, 440–41 (1982)*; *Watford v. Morse, 202 Va. 605, 607, 118 S.E.2d 681, 682–83 (1961)*.

### PRACTICE COMMENTARY

The court in *Edlow* held that this instruction is not in conflict with an instruction that states that the fact that an accident happened is not proof of negligence (Instruction No. 4.105). The opinion states that these instructions, considered together, "recognize that proof of facts raising a *prima facie* case of negligence may be rebutted by other evidence." *Edlow, 243 Va. at 350, 415 S.E.2d at 439.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.010
## Right to Assume Other Driver's Ordinary Care

**The driver of a vehicle has a right to assume that the driver of another vehicle will operate such other vehicle in a lawful manner until he realizes, or in the exercise of ordinary care should realize, that the other driver is not going to do so.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hawthorne v. VanMarter, 279 Va. 566, 585–86, 692 S.E.2d 226, 238–39 (2010)*; *Litchford v. Hancock, 232 Va. 496, 500, 352 S.E.2d 335, 338 (1987)*; *Citizens Rapid Transit Co. v. O'Hara, 203 Va. 979, 982, 128 S.E.2d 270, 273 (1962)*; *Harris Motor Lines v. Green, 184 Va. 984, 992, 37 S.E.2d 4, 6–7 (1946)*.

### PRACTICE COMMENTARY

Ordinarily, a plaintiff's failure to anticipate negligence on the part of the defendant is not contributory negligence. However, once he knows, or reasonably should know, that the defendant is not using due care, the "right to assume" doctrine becomes inapplicable. *Litchford, 232 Va.at 500, 352 S.E.2d at 338*. A plaintiff cannot rely upon an assumption that is contrary to what he knew or reasonably should have known. *Id.*

☞ ***PRACTICE POINTER:*** Although this instruction is generally used by a plaintiff seeking to avoid a finding of contributory negligence, a defendant also has a right to assume that a plaintiff will use ordinary care. Consideration should be given to the applicability of the doctrine of last clear chance or whether the accident was caused by concurring negligence. See Instruction 7.030, Last Clear Chance: Helpless Plaintiff. See also *Harris Motor Lines, 184 Va. at 991, 37 S.E.2d at 6*; *Harrell v. Virginia Elec. & Power Co., 177 Va. 59, 64–65, 12 S.E.2d 833, 836 (1941)*.

### *ALERTS:*

- In *Russell v. Branch Motor Express, 237 Va. 20, 22, 375 S.E.2d 722, 723 (1989)*, the court held that the granting of this instruction was error because it took into account only a portion of the disputed evidence at trial.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.020
## Lookout: Scope of Duty to Keep a Proper Lookout

**The duty to keep a proper lookout requires a driver to use ordinary care to look in all directions for** [vehicles; persons; conditions] **that would affect his driving, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid a collision under the circumstances.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *RGR, LLC v. Settle, 288 Va. 260, 284–85, 764 S.E.2d 8, 22 (2014)*; *Burroughs v. Keffer, 272 Va. 162, 167–68, 630 S.E.2d 297, 301 (2006)*; *Loving v. Hayden, 245 Va. 441, 443–44, 429 S.E.2d 8, 10 (1993)*; *Todt v. Shaw, 223 Va. 123, 128–129, 286 S.E.2d 211, 214–15 (1982)*; *Jordan v. Jordan, 220 Va. 160, 162–63, 257 S.E.2d 761, 762–63, (1979)*; *Maroulis v. Elliott, 207 Va. 503, 513, 151 S.E.2d 339, 346 (1966)*; *Carter v. Garner, 204 Va. 153, 155–56, 129 S.E.2d 671, 672–73 (1963)*; *Richmond Greyhound Lines Inc. v. Brown, 203 Va. 950, 953, 128 S.E.2d 267, 269–70 (1962)*; *Russell v. Hammond, 200 Va. 600, 605–06, 106 S.E.2d 626, 630–31 (1959)*; *Matthews v. Hicks, 197 Va. 112, 115, 87 S.E.2d 629, 631 (1955)*.

## Practice Commentary

The duty to keep a proper lookout is not an absolute duty to discover a condition but to look with reasonable care. *Reams v. Doe, 236 Va. 237, 239, 372 S.E.2d 405, 406–07 (1988)*; *Railway Express Agency, Inc. v. Moore, 201 Va. 928, 931–32, 114 S.E.2d 626, 629–30 (1960)*; *Perry v. Thompson, 196 Va. 817, 820, 86 S.E.2d 35, 37 (1955)*; *Oliver v. Forsyth, 190 Va. 710, 715–16, 58 S.E.2d 49, 51 (1950)*. Similarly, a driver is not required to be constantly on the lookout for a following vehicle. *Todt, 223 Va. at 228–29, 286 S.E.2d at 214–15*; *Brown v. Wright, 216 Va. 10, 11–12, 216 S.E.2d 13, 15 (1975)*.

This instruction is designed to be general and to leave specific circumstances for counsel to argue to the jury. See, e.g., *Medina v. Hegerberg, 245 Va. 210, 212–13, 427 S.E.2d 343, 344–45 (1993)*; *Johnson v. Wilmoth, 209 Va. 82, 87–88, 161 S.E.2d 682, 686 (1968)*; *Finch v. McRae, 206 Va. 917, 922–23, 147 S.E.2d 83, 87–88 (1966)*; *Crouse v. Pugh, 188 Va. 156, 167–68, 49 S.E.2d 421, 427 (1948)*. The following situations have been recognized as ones in which the operator's vision has been obscured: (1) dust, *Camp v. Bryant, 171 Va. 390, 395–96, 199 S.E. 469, 471 (1938)*; *Clark v. Parker, 161 Va. 480, 485–86, 171 S.E. 600, 601 (1933)*; (2) fog, *Biggs v. Martin, 210 Va. 630, 634–35, 172 S.E.2d 767, 770 (1970)*.

Virginia, unlike some other jurisdictions, does not require that an operator of a vehicle be able to stop within range of his lights or within the range of his vision. *Finch, 206 Va. at 922, 147 S.E.2d at 87*.

The fact that one vehicle has the right-of-way over another at a street intersection, *Yellow Cab Co. v. Eden, 178 Va. 325, 341, 16 S.E.2d 625, 631 (1941)*, or is proceeding on a green light, *Hodnett v. Friend, 232 Va. 447, 451–53, 352 S.E.2d 338, 340–42 (1987)*, does not relieve the driver of the favored vehicle of this duty.

☞ ***Practice Pointer:*** The duty to keep a proper lookout may involve the duty to hear as well as the duty to see. *Doss v. Rader, 187 Va. 231, 237–38, 46 S.E.2d 434, 437 (1948)*.

☞ ***PRACTICE POINTER:*** See also Instruction No. 10.025, Lookout: Duty to Keep Windows Clear.

☞ ***PRACTICE POINTER:*** The duty to keep a proper lookout may also involve the duty not to fall asleep at the wheel. *Lucas v. Riverhill Poultry, Inc., 860 S.E.2d 361, 370 (2021).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.025
## Lookout: Duty to Keep Windows Clear

**A driver of a vehicle has a duty to use ordinary care to keep his windows clear from [substantial] obstruction so that he can keep a proper lookout.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-855, 46.2-1052, 46.2-1054 (substantial obstruction by suspended items).

**CASE AUTHORITY:** *Anderson v. Payne, 189 Va. 712, 716, 54 S.E.2d 82, 84 (1949).*

### PRACTICE COMMENTARY

A person is guilty of reckless driving if he/she drives a vehicle when it is so loaded, or when there are in the front seat such number of persons, as to obstruct the view of the driver to the front or sides of the vehicle or to interfere with the driver's control over the driving mechanism of the vehicle. See Va. Code Ann. § 46.2-855.

It is against the law for a driver to obstruct his vision or clear view of the highway with signs, posters, colored or tinted film, sun-shading material, or other colored material. See Va. Code Ann. § 46.2-1052.

It is against the law for a driver to substantially obstruct his vision or clear view of the highway with suspended objects. See Va. Code Ann. § 46.2-1054.

☞ ***PRACTICE POINTER:*** See Instruction No. 10.020, Lookout: Scope of Duty to Keep a Proper Lookout.

### *ALERTS:*

If the violation falls under Va. Code Ann. § 46.2-1054, the instruction should be modified to include "substantial" due to an amendment to Va. Code Ann. § 46.2-1054 enacted in 2020.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.030
## Lookout: When Lights to Be Lighted

**The driver of a vehicle has a duty to display lighted headlights and taillights** [from sunset to sunrise; whenever persons or vehicles on the highway are not clearly visible at a distance of 500 feet; whenever windshield wipers are in continuous use as a result of fog, rain, sleet, or snow]**.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1030.

**CASE AUTHORITY:** *Allen v. Brooks, 203 Va. 357, 363–365, 124 S.E.2d 18, 23–24 (1962).*

### PRACTICE COMMENTARY

The duty incorporated in this instruction applies to "[e]very vehicle on a highway in the Commonwealth." Va. Code Ann. § 46.2-1030(A). The term "highway" is defined in Va. Code Ann. § 46.2-100.

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 46.2-1030(A)(ii) includes "rain, smoke, fog, snow, sleet, [and] insufficient light" as examples of "unfavorable atmospheric conditions" that might reduce visibility to a point where lights are necessary.

### *ALERTS:*

- This instruction should be modified to conform to Va. Code Ann. § 46.2-1015 in the instance of bicycles, electric power-assisted bicycles, motorized scooters, and mopeds.

- The duty to display headlights does not apply where the windshield wipers are being used intermittently, as opposed to continuously, in misting rain, sleet, or snow. Va. Code Ann. § 46.2-1030(A)(iii).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.040**
**Control: Skidding**

**The fact that a vehicle skidded on a slippery road is not, of itself, sufficient to establish negligence on the part of the driver. If you believe by the greater weight of the evidence that the skidding was caused by failure of the defendant to act as a reasonable person would have acted under the circumstances, then he was negligent. If you believe that the slippery condition of the road was the only cause of the skidding, then the defendant was not negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Edlow v. Arnold, 243 Va. 345, 351, 415 S.E.2d 436, 439 (1992)*; *Medlar v. Mohan, 242 Va. 162, 165–66, 409 S.E.2d 123, 125 (1991)*; *Trail v. White, 221 Va. 932, 934, 275 S.E.2d 617, 619 (1981)*; *Pullen v. Fagan, 204 Va. 601, 604, 132 S.E.2d 718, 721 (1963)*; *Whitley v. Patterson, 204 Va. 36, 38–39, 129 S.E.2d 19, 21 (1963)*; *Mountjoy v. Burton, 185 Va. 936, 939–40, 40 S.E.2d 803, 804–05 (1947)*.

### PRACTICE COMMENTARY

This instruction is to be used where there is uncontested evidence that the defendant's motor vehicle skidded and defendant contends that the skidding was caused by road conditions and not his negligence.

Evidence that a vehicle skidded is sufficient to allow the plaintiff's case to go to the jury on the issue of negligence. *Medlar, 242 Va. at 166, 409 S.E.2d at 125*; *Bedget v. Lewin, 202 Va. 535, 539, 118 S.E.2d 650, 653–54 (1961)*; *Crist v. Washington, Va. & Md. Coach Co., 196 Va. 642, 650, 85 S.E.2d 213, 217 (1955)*. The burden then shifts to the defendant to come forward with evidence to show that the skid resulted not from his failure to act reasonably under the circumstances, but rather from the slippery condition of the road. *Bedget, 202 Va. at 539, 118 S.E.2d at 653–54*.

The principal inquiry, therefore, involves the driver's conduct prior to the skid. *Trail, 221 Va. at 934, 275 S.E.2d at 619*. If, for example, the slippery road condition was known to the defendant, his duty is to use care in proportion to the known condition. See *Pullen, 204 Va. at 604, 132 S.E.2d at 721*; *Webb v. Smith, 176 Va. 235, 239, 10 S.E.2d 503, 504 (1940)*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.050
## Control: Continuous Driving Over 13 Hours

**A person who drives** [a motor vehicle; motor vehicles] **for more than thirteen hours in any twenty-four hour period is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-812.

**CASE AUTHORITY:** *Mobley v. Pendleton, 212 Va. 418, 421–22, 184 S.E.2d 798, 801–02 (1971)*; *Masters v. Cardi, 186 Va. 261, 265–66, 42 S.E.2d 203, 205 (1947)*; *Chick Transit Corp. v. Edenton, 170 Va. 361, 365–66, 196 S.E. 648, 650 (1938)*.

### PRACTICE COMMENTARY

The statute provides that the 13-hour period is an aggregate that includes driving done in any other state. If, however, the accident occurs outside Virginia, and the law of another forum is applied, the instruction should not be used unless it is a correct statement of the law to be applied under choice of law rules.

Va. Code Ann. § 46.2-812, by its terms, does not "apply to the operation of motor vehicles used in snow or ice control or removal operations or similar emergency situations." The statute also provides "[n]o owner of any vehicle shall cause or permit it to be driven in violation of this section."

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.060**
**Control: Falling Asleep**

**A person who falls asleep while driving is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Newell v. Riggins, 197 Va. 490, 494, 90 S.E.2d 150, 152 (1955)*; *Lipscomb v. O'Brien, 181 Va. 471, 475–76, 25 S.E.2d 261, 263 (1943)*; *Jones v. Pasco, 179 Va. 7, 10, 18 S.E.2d 258, 259 (1942)*; *Lee v. Moore, 168 Va. 278, 281–82, 191 S.E. 589, 591 (1937).*

### PRACTICE COMMENTARY

This instruction should be given any time there is sufficient evidence upon which the jury could base a conclusion that the driver fell asleep. If the evidence to that effect is uncontroverted, or if the driver admits to having fallen asleep, that is prima facie proof of his negligence. *Newell, 197 Va. at 494, 90 S.E.2d at 152.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.070**
**Control: Brake Requirements**

**The driver of a vehicle has a duty not to drive a vehicle that has inadequate or improperly adjusted brakes.**

**If the driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-853, 46.2-1066 through 1071.

**CASE AUTHORITY:** *Stratton v. Bergman, 169 Va. 249, 253, 192 S.E. 813, 814 (1937).*

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-1067 prescribes the distances within which the brakes must be capable of stopping the vehicle.

☞ ***PRACTICE POINTER:*** The duty incorporated in this instruction applies to "[e]very motor vehicle when driven on a highway." Va. Code Ann. § 46.2-1066. The term "highway" is defined in Va. Code Ann. § 46.2-100.

The Supreme Court previously held that a sudden failure of brakes without any warning might lead to an "unavoidable accident" without any negligence on the part of the driver. *Culberson v. McCloud, 227 Va. 249, 252–53, 315 S.E.2d 219, 221 (1984)*; *Simmons v. Adams, 202 Va. 926, 930, 121 S.E.2d 379, 382 (1961)*; *Rountree v. Rountree, 198 Va. 658, 663, 96 S.E.2d 113, 116 (1957).* The Court has since abrogated the unavoidable accident doctrine, holding that the instruction should never be given and that it is error to do so. *Hancock-Underwood v. Knight, 277 Va. 127, 134–36, 670 S.E.2d 720, 724–25 (2009).* Thus, the sudden failure of brakes, without other negligence, is adequately addressed by the other instructions usually given on negligence without an unavoidable accident instruction. Moreover, a sudden emergency instruction is not warranted if a sudden brake failure concurs with other negligence. *Thibodeau v. Vandermark, 234 Va. 15, 18, 360 S.E.2d 171, 173 (1987).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.080**
**Speed: Exceeding Posted Limit**

**The maximum speed limit at the time and place of the collision was** (number) **miles per hour.**

**If a driver was driving his vehicle faster than this limit, then he was negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-870, 46.2-871, 46.2-872, 46.2-873, 46.2-873.1, 46.2-873.2, 46.2-874, 46.2-874.1, 46.2-875, 46.2-876, 46.2-878.1, 46.2-878.2.

**CASE AUTHORITY:** *Kimberlin v. PM Transp., Inc., 264 Va. 261, 267, 563 S.E.2d 665, 668 (2002)*; *Maxie v. Doe, 215 Va. 409, 412, 211 S.E.2d 246, 248 (1975)*; *Dugroo v. Garrett, 203 Va. 918, 921–22, 128 S.E.2d 303, 305–06 (1962)*; *Interstate Veneer Co. v. Edwards, 191 Va. 107, 111–12, 60 S.E.2d 4, 6–7 (1950).*

### PRACTICE COMMENTARY

"Unlawful speed" is speed over the statutory limit, whereas "improper," "excessive," or "unreasonable" speed may simply refer to speed that is too fast under the circumstances. *Dugroo, 203 Va. at 922, 128 S.E.2d at 306.*

A reasonable speed is governed by existing conditions and not necessarily by the posted speed limit. *Kimberlin, 264 Va. at 267, 563 S.E.2d at 668.* See the scope note regarding when a duty is absolute and when a duty depends on a driver's failure to use ordinary care.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.090
## Speed: Posted Minimum Speed

**The minimum speed required at the time and place of the collision was** (number) **miles per hour. The driver of a vehicle has a duty not to drive his vehicle at a speed below the posted minimum speed** [except when necessary for safe operation; except when in compliance with the law]**.**

**If a driver was driving his vehicle at less than the posted minimum speed, then he was negligent** [unless it was necessary for safe operation; unless it was in compliance with the law]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-877.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

No person may drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. No person may drive a vehicle at less than the posted minimum speed limit except when necessary for safe operation or in compliance with law. In the latter situation, the driver need not actually impede the movement of traffic. VA. Code Ann. § 46.2-877. See Instruction No. 10.100, Speed: Driving Too Slowly; Instruction No. 10.330, Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway.

Va. Code Ann. § 46.2-877 allows drivers to drive below the posted minimum speed when such slow movement is necessary for safe operation or complies with the law.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.100**
**Speed: Driving Too Slowly**

**The driver of a vehicle has a duty not to drive his vehicle at such slow speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-877.

**CASE AUTHORITY:** *Thomas v. Settle, 247 Va. 15, 23, 439 S.E.2d 360, 365 (1994).*

### PRACTICE COMMENTARY

This instruction is applicable where there is evidence that a driver was driving too slowly but there is no posted minimum speed. See Instruction No. 10.090 and Instruction No. 10.330.

No person may drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law. No person may drive a vehicle at less than the posted *minimum speed limit* except when necessary for safe operation or in compliance with law. In the latter situation, the driver need not actually impede the movement of traffic to be negligent. Va. Code Ann. § 46.2-877. See Instruction No. 10.090, Speed: Posted Minimum Speed; Instruction No. 10.330, Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway.

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 46.2-1081 requires farm machinery and slow-moving vehicles to display a triangular slow-moving-vehicle emblem on the rear of the vehicle any time it is operated on a highway.

Va. Code Ann. § 46.2-877 allows drivers to drive so slowly as to impede the normal and reasonable movement of traffic when such slow movement is necessary for safe operation or complies with the law.

### *ALERTS*:

None.

### *RESEARCH REFERENCES*:

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.105
## Speed: Table of Speed and Stopping Distances

**The following has been constructed, using scientific reasoning, to provide you with an average baseline for motor vehicle stopping distances for a vehicle in good condition on a level, dry stretch of highway, free from loose material:**

[Read portion of Table at Va. Code Ann. § 46.2-880, reprinted below, that is pertinent to the evidence]

**These averages are not binding upon you, and if you find that the vehicle or highway conditions are different from those used in developing these average stopping distances, you may take the differences into account in your deliberations.**

| SPEED IN | | AVERAGE STOPPING DISTANCES | | | TOTAL STOPPING DISTANCES: DRIVER AND | |
|---|---|---|---|---|---|---|
| Miles Per Hour | Feet Per Second | Automobile Brakes (In Feet) | Truck Brakes on All Wheels (In Feet) | Avg Driver Perception-Reaction Time (1.5 Seconds) (In Feet) | Automobiles (In Feet) | Trucks (In Feet) |
| 10 | 14.7 | 5 | 6 | 22 | 27 | 28 |
| 15 | 22.0 | 11 | 14 | 33 | 44 | 47 |
| 20 | 29.3 | 19 | 25 | 44 | 63 | 69 |
| 25 | 36.7 | 30 | 40 | 55 | 85 | 96 |
| 30 | 44.0 | 43 | 57 | 66 | 109 | 123 |
| 35 | 51.3 | 58 | 78 | 77 | 135 | 155 |
| 40 | 58.7 | 76 | 102 | 88 | 164 | 190 |
| 45 | 66.0 | 96 | 129 | 99 | 195 | 228 |
| 50 | 73.3 | 119 | 159 | 110 | 229 | 269 |
| 55 | 80.7 | 144 | 192 | 121 | 265 | 313 |
| 60 | 88.0 | 171 | 229 | 132 | 303 | 361 |
| 65 | 95.3 | 201 | 268 | 143 | 344 | 411 |
| 70 | 102.7 | 233 | 311 | 154 | 387 | 465 |
| 75 | 110.0 | 268 | 357 | 165 | 433 | 522 |
| 80 | 117.3 | 305 | 406 | 176 | 481 | 582 |
| 85 | 124.7 | 344 | 459 | 187 | 531 | 646 |
| 90 | 132.0 | 386 | 514 | 198 | 584 | 712 |
| 95 | 139.3 | 430 | 573 | 209 | 639 | 782 |
| 100 | 146.7 | 476 | 635 | 220 | 696 | 855 |

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-880.

**CASE AUTHORITY:** *Rascher v. Friend, 279 Va. 370, 377, 689 S.E.2d 661, 665 (2010)*; *Johnson v. Haas, 224 Va. 245, 247–49, 295 S.E.2d 789, 790–91 (1982)*; *Terry v. Fagan, 209 Va. 642, 648, 166 S.E.2d 254, 258 (1969)*; *White v. Hunt, 209 Va. 11, 15–16, 161 S.E.2d 809, 813 (1968).*

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-880 requires juries as well as courts to take notice of the table of speed and stopping distances, but the table does not raise a presumption. See *Beasley v. Bosschermuller, 206 Va. 360, 366, 143 S.E.2d 881, 886 (1965).*

Va. Code Ann. § 46.2-880 permits consideration by the jury of the data from the table if deviations from the conditions are addressed by "additional site-specific examination and/or explanation."

### *ALERTS:*

- Va. Code Ann. § 46.2-880 requires courts and juries to take notice of the table, but only when "inquiry thereon is pertinent to the issues." In *Bunn v. Norfolk, F. & D. R. Co., 217 Va. 45, 51, 225 S.E.2d 375, 379 (1976)*, the Virginia Supreme Court reiterated that it has "repeatedly discouraged the granting of an instruction on the tables . . . unless . . . clearly supported by the evidence." "Proof of each of the factors enunciated in Code § [46.2-880] is required as a foundation before any instruction based on tables of speed and stopping distance can be presented to the jury." *Johnson, 224 Va. at 249, 195 S.E.2d at 791* (decided under prior version of the code section).

- The Supreme Court of Virginia has explained that the tables "were never intended to apply to two-wheel motorcycles." *Beasley v. Barnes, 201 Va. 593, 597, 113 S.E.2d 62, 64–65 (1960).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.110
## Duty to Drive on the Right

**The driver of a vehicle has a duty to drive on the right half of the highway** [[unless it is impracticable to drive on the right side; except when lawfully overtaking and passing another vehicle] in which event the driver may drive on the left side, providing he uses ordinary care].

**If a driver fails to perform this duty, then he [or she] is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-802, 46.2-837, 46.2-838, 46.2-843.

**CASE AUTHORITY:** *Hicks v. Cassidy, 208 Va. 610, 612–13, 159 S.E.2d 827, 829–30 (1968)*; *Bond v. Joyner, 205 Va. 292, 296, 136 S.E.2d 903, 906 (1964)*; *Davidson v. Jackson, 193 Va. 330, 334, 336, 68 S.E.2d 524, 527–28 (1952)*; *Hamilton v. Glemming, 187 Va. 309, 313–15, 46 S.E.2d 438, 440–41 (1948)*.

## PRACTICE COMMENTARY

When an accident occurs on plaintiff's side of the road, the defendant is prima facie negligent. *Riley v. Harris, 211 Va. 359, 362, 177 S.E.2d 630, 633 (1970)*. He must come forward with evidence to show that he was in the plaintiff's lane of travel because of something other than his own negligence. *Id.* Among the excuses sufficient for jury consideration are:

(1) (1) steering mechanism failure, *Interstate Veneer Co. v. Edwards, 191 Va. 107, 116–18, 60 S.E.2d 4, 8–9 (1950)*;

(2) (2) tire blow-out, *Pickett v. Cooper, 202 Va. 60, 63, 116 S.E.2d 48, 51 (1960)*;

(3) (3) skidding because of slippery conditions, *Pullen v. Fagan, 204 Va. 601, 604–05, 132 S.E.2d 718, 720–21 (1963)*.

If the facts of the case support a finding of gross negligence, an instruction on punitive damages may be warranted. See Instruction No. 9.080, General Punitive Damages. Inadvertently permitting wheels to cross over the centerline does not constitute gross negligence. *Bond, 205 Va. at 296, 136 S.E.2d at 906*.

A vehicle passing through a circular intersection (traffic circle) must be driven to the right of the central island. Va. Code Ann. § 46.2-807. A vehicle crossing an intersection of highways or the intersection of a highway by a railroad track must keep to the right. Va. Code Ann. § 46.2-803.

"Lawfully passing" means, for example, in compliance with Va. Code Ann. §§ 46.2-838 (proper passing distance), 46.2-841 (passing on the right), 46.2-843 (clear visibility required), and 46.2-858 (reckless to pass at intersection).

☞ ***PRACTICE POINTER:*** See Instruction No. 10.130 and Instruction No. 10.140 on driving on half of the road and heeding lane markings, and see Instruction No. 10.170 and Instruction No. 10.180 on overtaking and passing. See also *Wright v. Swain, 168 Va. 315, 318–19, 191 S.E. 611, 612–13 (1937)* on the issue of whether improper passing on the left constitutes gross negligence.

- This instruction does not apply when the lane markings are not visible because of snow covering the roadway. *Fisher v. Gordon, 210 Va. 523, 527–28, 171 S.E.2d 835, 838 (1970)*. Rather, a jury issue is created as to whether each of the parties was exercising care proportionate to the known and obvious dangerous

conditions of the highway. *Id.*

***ALERTS*:**

None.

***RESEARCH REFERENCES*:**

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.115
## Defendant in Plaintiff's Lane of Travel

**The fact that the defendant's oncoming vehicle was in the plaintiff's lane of travel at the time of impact allows you to find that the defendant was negligent unless you believe from other evidence that the defendant was not negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-802.

**CASE AUTHORITY:** *Riley v. Harris, 211 Va. 359, 362, 177 S.E.2d 630, 633 (1970); Cooper v. Pickett, 202 Va. 65, 67, 116 S.E.2d 52, 54 (1960); Pickett v. Cooper, 202 Va. 60, 63, 116 S.E.2d 48, 51 (1960).*

### PRACTICE COMMENTARY

The plaintiff has made a *prima facie* case of negligence when the defendant's vehicle is in the plaintiff's lane of travel, and the burden shifts to the defendant to produce evidence of why he is not negligent. *Cooper, 202 Va. at 67, 116 S.E.2d at 54; Pickett, 202 Va. at 63, 116 S.E.2d at 51.* An instruction was properly refused, however, for describing the defendant as being "on the wrong side of the road" at the time of the collision. Use of the phrase "in the plaintiff's lane of travel" was approved. *Riley, 211 Va. at 363–64, 177 S.E.2d at 634.*

### *ALERTS:*

None.

### RESEARCH REFERENCES:

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.120
## Proper Lane for Slow-Moving Vehicle on Multiple-Lane Road

**A driver of a vehicle proceeding at less than the normal speed of traffic, considering the time, place, and conditions, has a duty to drive in the lane nearest the right** [edge; curb] **of the highway when that lane is available for travel, except when** [overtaking and passing another vehicle; preparing to make a left turn; the right lane is reserved for slow-moving traffic].

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-804(1).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

See Instruction No. 10.090, Posted Minimum Speed; Instruction No. 10.100, Driving Too Slowly; and Instruction No. 10.320 through Instruction No. 10.360 for duties when stopping on highway.

### *ALERTS:*

- Pursuant to the provisions of Va. Code Ann. § 46.2-804, the duty covered by this instruction applies only when the highway has been divided into clearly marked lanes.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.130
## Duty to Drive on Half of the Road

**The driver of a vehicle has a duty to give, as nearly as possible, one half of the main traveled portion of the highway to a driver proceeding in the opposite direction. When** [the road is unmarked; the dividing lines are so faint as to be unnoticeable]**, the dividing line is the center of the highway.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-802, 46.2-837.

**CASE AUTHORITY:** *Van Buren v. Simmons, 235 Va. 46, 50–51, 365 S.E.2d 746, 748–49 (1988)*; *Tolbert v. Gillespie, 195 Va. 647, 650, 79 S.E.2d 670, 671–72 (1954)*.

### PRACTICE COMMENTARY

A driver's right to assume that the vehicle traveling in the opposite direction will proceed on the proper side of the road and in the proper lane, see *Johnson v. Kellam, 162 Va. 757, 762, 175 S.E. 634, 635 (1934)*, gives rise to the assumption set out in Instruction No. 6.060, Contributory Negligence: Right to Assume Ordinary Care.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.140
## Duty to Heed Lane Markings

**The driver of a vehicle has a duty to drive to the right of a** [double solid line; solid line immediately to the right of a broken line] **except when** [making a left turn; in order to pass a pedestrian or a device moved by human power, including a bicycle, skateboard, or foot-scooter, provided such movement can be made safely].

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-804(5)–(6).

**CASE AUTHORITY:** *Neighbors v. Moore, 216 Va. 514, 519 n.2, 219 S.E.2d 692, 696 n.2 (1975)*; *Interstate Veneer Co. v. Edwards, 191 Va. 107, 112–13, 60 S.E.2d 4, 7 (1950).*

### PRACTICE COMMENTARY

Left turns may be made across a solid or a double solid line. Va. Code Ann. § 46.2-804.

### *ALERTS:*

• By operation of Va. Code Ann. § 46.2-804(5), it is unlawful for a driver to drive his vehicle to the left of the solid line. The fact that he starts to pass when a single broken line marks the lanes does not give him the right to continue in the opposite lane after he reaches the solid line. *Howell v. Cahoon, 236 Va. 3, 7, 372 S.E.2d 363, 365 (1988)*; *Neighbors, 216 Va. at 519 n.2, 219 S.E.2d at 696 n.2.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.150
## Three-Lane Roads

**When a highway is divided into three lanes, the driver of a vehicle has a duty not to drive in the center lane** [except when overtaking and passing another vehicle; except in preparation for a left turn; unless the center lane is being used exclusively for traffic moving in his direction and is so marked].

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-804(3).

**CASE AUTHORITY:** *Sink v. Masterson, 191 Va. 618, 61 S.E.2d 863 (1950)*; *Chick Transit Corp. v. Edenton, 170 Va. 361, 368–69, 196 S.E. 648, 651–52 (1938)*; *Wright v. Swain, 168 Va. 315, 319–20, 191 S.E. 611, 613 (1937)*.

### PRACTICE COMMENTARY

The prohibitions contained in Va. Code Ann. § 46.2-804(3) are subject to the provisions of Va. Code Ann. § 46.2-804(5).

### *ALERTS:*

- This instruction is not applicable if there are other official traffic-control devices directing specified traffic to use particular lanes. Rather, drivers are required to obey the directions of every such device. Va. Code Ann. § 46.2-804(3).

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.160
## Changing Lanes

**The driver of a vehicle has a duty to drive as nearly as practicable within a single lane and not to move from that lane until he has used ordinary care to see that the movement can be made with safety.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-804(2).

**CASE AUTHORITY:** *Nicholaou v. Harrington, 217 Va. 618, 625 & n.4, 231 S.E.2d 318, 323–24 & n.4 (1977)*; *Ragsdale v. Jones, 202 Va. 278, 281–82, 117 S.E.2d 114, 117 (1960)*; *Wallingford v. Karnes, 194 Va. 648, 652, 74 S.E.2d 161, 164 (1953)*.

### PRACTICE COMMENTARY

For instructions addressing a driver's duty to signal an intended movement, including a lane change, see Instruction Nos. 10.190, Stopping and Turning: Duty to Signal, and 10.200.

For an instruction addressing a driver's duty once he has signaled a change in the course of his vehicle, see Instruction No. 10.210.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.170
## Overtaking and Passing: Visibility

**The driver of a vehicle overtaking and passing another vehicle proceeding in the same direction has a duty not to drive to the left side of the roadway unless such left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-843.

**CASE AUTHORITY:** *Smith v. New Dixie Lines, Inc., 201 Va. 466, 470, 111 S.E.2d 434, 437 (1959)*; *Simmons v. Craig, 199 Va. 338, 342–44, 99 S.E.2d 641, 645–46 (1957)*; *Wright v. Osborne, 175 Va. 442, 444, 446, 9 S.E.2d 452, 453–54 (1940).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.180
## Overtaking and Passing: Clearance

**The driver of a vehicle passing another vehicle proceeding in the same direction has a duty to pass at least two feet to the left of that vehicle and not to return to the right side of the highway until he can do so safely.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-838(A).

**CASE AUTHORITY:** *Dey v. Virginia Transit Co., 187 Va. 635, 639, 47 S.E.2d 552, 554 (1948).*

**PRACTICE COMMENTARY** None.

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 46.2-839 requires three (3) feet of clearance for passing bicycles, electrically powered vehicles, mopeds, animals, and animal-drawn vehicles. See *Mann v. Hinton, 249 Va. 555, 561–62, 457 S.E.2d 22, 26–27 (1995).*

***ALERTS:***

- A passing driver must return to his proper lane before the solid middle line begins again. *Neighbors v. Moore, 216 Va. 514, 519 n.2, 219 S.E.2d 692, 696 n.2 (1975).* See also *Howell v. Cahoon, 236 Va. 3, 6–7, 372 S.E.2d 363, 365 (1988).*

- A parked vehicle is not "proceeding in the same direction." *Scott v. Greater Richmond Transit Co., 241 Va. 300, 306, 402 S.E.2d 214, 218 (1991).*

Subsection (B) of Va. Code Ann. § 46.2-838 creates a duty to proceed with due caution and maintain a safe speed for highway conditions when overtaking certain stationary vehicles displaying a flashing, blinking, or alternating amber light (rural mail carriers; highway and highway utility construction maintenance and repair vehicles; roadside assistance vehicles; traffic management vehicles). Subsection (C) creates various duties associated with overtaking a stationary vehicle in the process of refuse collection operations on a highway having at least four lanes, at least two of which are intended for traffic in the same direction as the approaching vehicle. This instruction can serve as a guide if either circumstance is at issue. Simply replace the phrase "passing another vehicle proceeding in the same direction" with "passing a stationary [type of vehicle]" and substitute the applicable duty or duties for the subsection (A) duty included in the instruction.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.190
## Stopping and Turning: Duty to Signal

**Before the driver of a vehicle** [turns; partly turns; changes lanes; stops; backs], **he has a duty to use ordinary care to see if such movement can be made safely, and if he makes such movement he must give a signal to any vehicle that may be affected by his intended movement.**

**If a driver fails to either use ordinary care to see if such movement can be made safely or fails to give a signal to any vehicle that may be affected by his movement, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-848.

**CASE AUTHORITY:** *Hogan v. Carter, 226 Va. 361, 369, 310 S.E.2d 666, 670 (1983)*; *Neighbors v. Moore, 216 Va. 514, 517, 219 S.E.2d 692, 695 (1975)*; *Fisher v. Gordon, 210 Va. 523, 528, 171 S.E.2d 835, 839 (1970)*; *Spence v. Miller, 197 Va. 477, 479, 90 S.E.2d 131, 133 (1955).*

### PRACTICE COMMENTARY

Because other instructions will be given on the duty of the driver to use ordinary care, this instruction covers only the duty to signal an intended movement.

Instruction No. 10.020, Scope of Duty to Keep a Proper Lookout, should normally be given with this instruction. See *Brown v. Peters, 202 Va. 382, 389, 117 S.E.2d 695, 699–700 (1961)*; *Von Roy v. Whitescarver, 197 Va. 384, 391, 89 S.E.2d 346, 351 (1955)*. This instruction also applies to drivers of vehicles "stopped at the curb or edge" of the road, who must signal their intentions before moving into traffic. Va. Code Ann. § 46.2-851.

See Instruction No. 4.000 above, concerning the definition of ordinary care.

### *ALERTS:*

- Va. Code Ann. § 46.2-848 requires a driver who intends to back, stop, turn, or partly turn from a direct line to "first see that such movement can be made safely . . . ." It is clear from the cases, however, that "safely" means nothing more than that the driver must use ordinary care. It is reversible error to suggest that a driver is an insurer of the safety of his movement. *Smith v. Clark, 187 Va. 181, 190–91, 46 S.E.2d 21, 24–25 (1948)*. It is also error to fail to instruct the jury that a driver needs to use only ordinary care to see that his movement can be made in safety. *Rushton v. Mountcastle, 202 Va. 521, 526, 118 S.E.2d 660, 664 (1961)*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.200
## Turn or Stop Signal

**If the driver of a vehicle may affect the operation of another's vehicle by** [turning; changing lanes; stopping]**, then the driver has a duty to give a visible** [left turn signal; right turn signal; brake light] **continuously for a distance of at least** [100; 50] **feet.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-848, 46.2-849(B).

**CASE AUTHORITY:** *Unger v. Rackley, 205 Va. 520, 524–25, 138 S.E.2d 1, 4–5 (1964)*; *Hershman v. Payne, 196 Va. 241, 243–44, 83 S.E.2d 418, 419–20 (1954)*; *Lanier v. Johnson, 190 Va. 1, 4–5, 55 S.E.2d 442, 443 (1949).*

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-849 requires signals to be given for at least 50 feet at speeds of 35 miles per hour and less or for at least 100 feet at speeds above 35 miles per hour. Va. Code Ann. § 46.2-849(B). See Instruction No. 17.020 for visibility requirements of the brake lights. There are no statutory requirements for turn signal lights, but they must be of a type approved by the Superintendent of Motor Vehicles. Va. Code Ann. § 46.2-849(A).

The Code also allows these signals to be made by hand: extending the driver's left arm horizontally, level with the shoulder, to indicate a left turn; extending the driver's left arm upward to indicate right turn; and extending the driver's arm downward to indicate slowing down or stopping. Va. Code Ann. § 46.2-849(A). If the particular facts of a case show that giving of one of the above hand signals is at issue, the appropriate language should be inserted into this instruction.

☞ ***PRACTICE POINTER:*** For the duty of a person riding a bicycle, electric personal assistive mobility device, electric power-assisted bicycle, or moped to give signals, see Va. Code Ann. § 46.2-849(C)–(D).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.210
## Changing Course After Signaling

**If the driver of a vehicle signals a change in the course of his vehicle, then he has a duty to follow the course indicated** [unless he alters the original signal. If he does, he has duty to use ordinary care to see that other [drivers; pedestrians] have seen and are aware of the change]**.**

**If a driver fails to perform** [this duty; either or both of these duties]**, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-850.

**CASE AUTHORITY:** *Esso Standard Oil Co. v. Williams, 202 Va. 362, 365, 117 S.E.2d 93, 95 (1960).*

### PRACTICE COMMENTARY

For an instruction addressing a driver's duty in changing the lane of travel of his vehicle, see Instruction No. 10.160.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.230
## Right Turn: Driver's Duty

**The driver of a vehicle has a duty to make a** [right turn; approach for a right turn] **as close as practicable to the** [right curb; edge of the roadway]**.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-846(A)(1).

**CASE AUTHORITY:** *Clausen v. Virginia Transit Co., 211 Va. 557, 558–59, 179 S.E.2d 463, 465 (1971).*

### PRACTICE COMMENTARY

The statute requires the approach for the turn, as well as the turn itself, to be made from the right-hand curb. If this is in issue, change the instruction to reflect it. See Va. Code Ann. § 46.2-846(A)(1).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.240
## Driver's Duty When Turning Left; Yielding Right-of-Way

**The driver of a vehicle intending to turn left has a duty to yield the right-of-way to any vehicle approaching from the opposite direction that is so close as to constitute a hazard.**

**If a driver fails to use ordinary care to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-825.

**CASE AUTHORITY:** *Graddy v. Hatchett, 233 Va. 65, 69, 353 S.E.2d 741, 743 (1987)*; *Hogan v. Carter, 226 Va. 361, 368–69, 310 S.E.2d 666, 670 (1983)*; *Southers v. Price, 211 Va. 469, 471–74, 178 S.E.2d 685, 687–88 (1971)*; *Atwell v. Watson, 204 Va. 624, 631 n.1, 632, 133 S.E.2d 552, 557 n.1, 558 (1963).*

### PRACTICE COMMENTARY

Instruction No. 10.020, Scope of Duty to Keep a Proper Lookout, should normally be given with this instruction.

☞ ***PRACTICE POINTER:*** Right-of-way at uncontrolled "T" intersections is governed by Va. Code Ann. § 46.2-824.

### *ALERTS:*

- This instruction does not apply when an automatic signal device controls the flow of traffic at the intersection and allows left turns while requiring all other traffic to stop. Va. Code Ann. § 46.2-825. On a T intersection when the cars approach on different roads the instruction does not apply because they are not approaching from opposite directions.

*Perkins v. Carr, 227 Va. 16, 19, 313 S.E.2d 372, 374 (1984).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.250**
**Driver's Duty on Left Turn From a Two-Way Road**

**The driver of a vehicle making a left turn has a duty to:**

**(1) approach the intersection in that portion of the right half of the roadway nearest the centerline;**

**(2) enter the intersection to the right of the centerline of the road;**

**(3) make the turn, whenever practicable, in that portion of the intersection to the left of the center of the intersection;**

**(4) leave the intersection to the right of the centerline of the street he is entering.**

**If a driver fails to use ordinary care to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-846(A)(2).

**CASE AUTHORITY:** *Doe v. Scott, 221 Va. 997, 1001–02, 277 S.E.2d 159, 161–62 (1981).*

### PRACTICE COMMENTARY

A driver who is turning left has a duty to yield to oncoming traffic. See Instruction No. 10.240.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.260
## Driver's Duty on Left Turn on Other Than Two-Way Roadways

**The driver of a vehicle has a duty to approach a left turn in the extreme left-hand lane that is lawfully available to him. In making the turn, he has a duty to turn into and, as nearly as practicable, to leave the intersection in the extreme left-hand lane lawfully available to him.**

**If a driver fails to use ordinary care to perform either or both of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-846(A)(3).

**CASE AUTHORITY:** *Fisher v. Gordon, 210 Va. 523, 527, 171 S.E.2d 835, 838 (1970).*

### PRACTICE COMMENTARY

Pursuant to the provisions of Va. Code Ann. § 46.2-846(A)(3), there are four situations to which this instruction applies:

(1) when the driver is turning into and from a crossover on a divided highway;

(2) when the driver is turning from a one-way street into a two-way street;

(3) when the driver is turning from a two-way street into a one-way street;

(4) when the driver is turning from a one-way street into another one-way street.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.262
## Steady Red Light

**The driver of a motor vehicle facing a steady red traffic light has the duty to stop and remain stopped so long as the light is red and thereafter not to proceed until it is safe to do so in the exercise of ordinary care.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-833(A).

**CASE AUTHORITY:** *Medlar v. Mohan, 242 Va. 162, 168, 409 S.E.2d 123, 126–27 (1991)*; *Arney v. Bogstad, 199 Va. 460, 462–63, 100 S.E.2d 749, 751–52 (1957).*

### PRACTICE COMMENTARY

A flashing red light—circular or arrow—indicates that traffic shall stop before entering an intersection. Va. Code Ann. § 46.2-833(A).

A driver of a motorcycle or moped or a bicycle rider may proceed through an intersection on a steady red light if certain conditions are met. See Va. Code Ann. § 46.2-833(B).

If the traffic lights controlling an intersection are out of service because of a power failure or other event, which prevents the giving of signals by the traffic lights, the drivers of vehicles approaching such intersection shall proceed as though such intersection was controlled by a stop sign on all approaches. Va. Code Ann. § 46.2-833(C).

### *ALERTS*:

- This instruction does not cover the "right turn on red" situation. See Instruction No. 10.268, Right Turn on Steady Red Light. This instruction also does not cover the situation where a driver is proceeding in the direction indicated by a lighted green arrow.

### *RESEARCH REFERENCES*:

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.264
## Green Light

**A driver facing a green light shall move in the direction of the signal, except he has a duty to yield to other vehicles and pedestrians lawfully within the intersection. In proceeding through the intersection, he has a duty to exercise ordinary care.**

**If a driver fails to perform either of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-833(A), 46.2-924.

**CASE AUTHORITY:** *Medlar v. Mohan, 242 Va. 162, 167, 409 S.E.2d 123, 126 (1991)*; *Hodnett v. Friend, 232 Va. 447, 451, 352 S.E.2d 338, 340–41 (1987)*; *Damron v. Hagy, 220 Va. 455, 457, 258 S.E.2d 517, 518 (1979)*; *Arney v. Bogstad, 199 Va. 460, 463–64, 100 S.E.2d 749, 752–53 (1957).*

### PRACTICE COMMENTARY

Starting with the decision in *Arney* and continuing through its decisions in *Damron*, *Hodnett*, and *Medlar* the Virginia Supreme Court has stated that a green light is not an unqualified command that a driver proceed in the direction indicated under all circumstances. Rather, it is only a command to do so in the exercise of due care.

Va. Code Ann. § 46.2-833 (A) also requires that traffic remain in motion as long as the green signal is given unless required to yield to other vehicles and pedestrians lawfully within the intersection.

If the traffic lights controlling an intersection are out of service because of a power failure or other event, which prevents the giving of signals by the traffic lights, the drivers of vehicles approaching such intersection shall proceed as though such intersection was controlled by a stop sign on all approaches. Va. Code Ann. § 46.2-833(C).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.266
## Steady Amber Light

**When faced with a steady amber light, it is the duty of a driver who has not already entered an intersection, including crosswalks, to use ordinary care to stop if it is not reasonably safe to continue.**

[A driver who has already entered the intersection when the signal changes to amber shall continue to move in the exercise of ordinary care until he clears the intersection.]

**If a driver fails to perform** [this duty; these duties], **then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-833(A).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

A flashing amber light indicates that traffic may proceed through the intersection or past the signal with reasonable care under the circumstances. Traffic that has already entered the intersection is required to move until the intersection is clear. Va Code Ann. § 46.2-833(A).

If the traffic lights controlling an intersection are out of service because of a power failure or other event, which prevents the giving of signals by the traffic lights, the drivers of vehicles approaching such intersection shall proceed as though such intersection was controlled by a stop sign on all approaches. Va. Code Ann. § 46.2-833(C).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.268
## Right Turn on Steady Red Light

**A driver intending to make a right turn on a steady red light has a duty to come to a full stop, yield the right-of-way [to any pedestrian lawfully in a crosswalk; to other traffic using the intersection], and to enter the intersection cautiously.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-835.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-835 distinguishes between a steady red "circular signal" and a steady red "arrow." Turns are prohibited on steady red arrows, or where traffic signs prohibit such a turn.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.270
## Stop Sign: Yielding Right-of-Way

**A driver facing a stop sign at an intersection has a duty to stop** [at a clearly marked stop line; before entering the crosswalk on the near side of the intersection; at the point nearest the intersecting road where the driver would have a view of approaching traffic on that road]**. Before proceeding, the driver also has a duty to yield the right-of-way to any approaching vehicle from either direction.**

**If a driver fails to use ordinary care to perform either or both of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-821.

**CASE AUTHORITY:** *Bentley v. Felts, 248 Va. 117, 119, 445 S.E.2d 131, 133 (1994)*; *Gammon v. Hyde, 199 Va. 918, 921–23, 103 S.E.2d 221, 224–25 (1958)*; *Umberger v. Koop, 194 Va. 123, 130–31, 72 S.E.2d 370, 375 (1952)*; *Oliver v. Forsyth, 190 Va. 710, 715, 58 S.E.2d 49, 51 (1950)*.

### PRACTICE COMMENTARY

This instruction is applicable at intersections where one of the roads is controlled by a stop sign, but the other is not. Instruction No. 10.010, Right to Assume Other Driver's Ordinary Care, and Instruction No. 10.020, Scope of Duty to Keep a Proper Lookout, should be given with this instruction when required by the evidence.

The instruction, properly modified, would be appropriate for a flashing red light at an intersection. Va. Code Ann. § 46.2-833(A).

An instruction given in the case of four-way stop signs was set out verbatim in *Henderson v. Gay, 245 Va. 478, 481, 429 S.E.2d 14, 16 (1993)*, but not discussed.

### *ALERTS:*

• The driver of a vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have. Va. Code Ann. § 46.2-823. The forfeiture, however, does not alter the duties of the driver required to stop by the stop sign. For an instruction on unlawful speed and forfeiture, see Instruction No. 10.295, Unlawful Speed: Forfeiture of Right of Way.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.280
## Yield Sign at Intersection: Yielding Right-of-Way

**When the driver of a vehicle approaches an intersection controlled by a yield right-of-way sign, he has a duty to slow down to a speed reasonable for the existing conditions and, if required for safety to stop** [at a clearly marked stop line; before entering the crosswalk on the near side of the intersection; or, in the absence of a marked crosswalk, at the point nearest the intersecting roadway where he would have a view of approaching traffic on the intersecting road]**. Before proceeding, the driver also has a duty to yield the right-of-way to the driver of any lawfully approaching vehicle.**

**If a driver fails to use ordinary care to perform either or both of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-821.

**CASE AUTHORITY:** *Lopez v. Dobson, 240 Va. 421, 424, 397 S.E.2d 863, 865 (1990).*

### PRACTICE COMMENTARY

This instruction is applicable at intersections where one of the roads is controlled by a yield sign but the other is not. This instruction should be used when a yield sign is posted at the intersection on the highway. Instruction Nos. 10.010, Right to Assume Other Driver's Ordinary Care, and 10.020, Lookout—Scope of Duty to Keep a Proper Lookout, should be given with this instruction when required by the evidence.

The choice of the alternative language within the brackets is sequential. If there is no stop line, the crosswalk is the reference. If there is neither a stop line nor a crosswalk, the point nearest the intersecting roadway where the driver has a view of approaching traffic is the reference.

☞ ***PRACTICE POINTER:*** The instruction can be used as a guide but requires substantial modification in the case of a flashing amber light at an intersection. Va. Code Ann. § 46.2-833(A).

### *ALERTS:*

- The duty to stop if there is no stop line is different when the intersection has a yield sign than when the intersection has a stop sign. Va. Code Ann. § 46.2-821. See Instruction No. 10.270 for the duty to stop when the intersection has a stop sign.

- The driver of a vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have. Va. Code Ann. § 46.2-823. The forfeiture of the right-of-way under Va. Code Ann. § 46.2-823 does not operate to transfer the right-of-way to another. *James v. City of Norfolk, 206 Va. 35, 37, 141 S.E.2d 748, 749 (1965)*; *Moore v. Warren, 203 Va. 117, 122–23, 122 S.E.2d 879, 883–84 (1961)*. Each driver is then required to use ordinary care for his own safety. *Moore, 203 Va. at 123, 122 S.E.2d at 884*. For a discussion of intersections, private roads and highways, see *Caplan v. Bogard, 264 Va. 219, 563 S.E.2d 719 (2002)*. When evidence of unlawful speed is presented, failure to instruct on the forfeiture of right-of-way constitutes reversible error. *Shearin v. Virginia Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944)*. For an instruction on unlawful speed and forfeiture, see Instruction No. 10.295, Unlawful Speed: Forfeiture of Right-of-Way.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.290
## Uncontrolled Intersection: Yielding Right-of-Way

**When two vehicles** [approach; enter] **an intersection at approximately the same time, the driver of the vehicle on the left has a duty to yield the right-of-way to the driver of the vehicle on the right.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-820.

**CASE AUTHORITY:** *Perkins v. Carr, 227 Va. 16, 18–19, 313 S.E.2d 372, 373 (1984)*; *Swisher v. Swisher, 223 Va. 499, 502–03, 290 S.E.2d 856, 858 (1982)*; *King v. Eccles, 209 Va. 726, 728–29, 167 S.E.2d 349, 351 (1969)*; *Farmer v. Valley Marine Center, Inc., 206 Va. 737, 740–42, 146 S.E.2d 265, 268–69 (1966)*; *Atwell v. Watson, 204 Va. 624, 630, 133 S.E.2d 552, 556–57 (1963)*; *Moore v. Warren, 203 Va. 117, 122, 124–25, 122 S.E.2d 879, 883, 885 (1961)*; *Johnson v. Harrison, 161 Va. 804, 808, 172 S.E. 259, 260 (1934)*.

## PRACTICE COMMENTARY

Va. Code Ann. § 46.2-820 applies only to uncontrolled intersections of public roads. *White v. Hunt, 209 Va. 11, 15, 161 S.E.2d 809, 812–13 (1968)*. The parking area of a condominium may be a highway if freely open to public use for vehicular traffic. *Furman v. Call, 234 Va. 437, 439–41, 362 S.E.2d 709, 710–11 (1987)*. A public restaurant entrance was found not to be a highway in *Caplan v. Bogard, 264 Va. 219, 228–29, 563 S.E.2d 719, 724 (2002)*. A way or place used for vehicular travel on property owned, leased, or controlled by the federal government located in Virginia is a highway. See Va. Code Ann. § 46.2-100.

The driver of a vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have. Va. Code Ann. § 46.2-823. The forfeiture of the right of way under Va. Code Ann. § 46.2-823 does not operate to transfer the right of way to another. *James v. City of Norfolk, 206 Va. 35, 37, 141 S.E.2d 748, 749 (1965)*; *Moore, 203 Va. at 122–23, 122 S.E.2d at 883–84*. Each driver is then required to use ordinary care for his own safety. *Moore, 203 Va. at 123, 122 S.E.2d at 884*. For a discussion of intersections, private roads and highways, see *Caplan v. Bogard, 264 Va. 219, 225–29, 563 S.E.2d 719, 722–24 (2002)*. When evidence of unlawful speed is presented, failure to instruct on the forfeiture of the right-of-way constitutes reversible error. *Shearin v. Virginia Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944)*. For an instruction on unlawful speed and forfeiture, see Instruction No. 10.295, Unlawful Speed: Forfeiture of Right-of-Way.

☞ ***PRACTICE POINTER:*** When a "Yield Right-of-Way" sign is posted at the intersection, Instruction No. 10.280, Yield Sign: Yielding Right-of-Way, should be given instead of this instruction. Instruction No. 10.020, Lookout: Scope of Duty to Keep a Proper Lookout, should normally be given with this instruction.

For accidents involving a "T" intersection, this instruction should be redrawn to conform to Va. Code Ann. § 46.2-824, such that the driver of the vehicle on the highway that intersects but does not cross the other highway shall yield the right-of-way to any vehicle traveling on the other highway.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.295
## Unlawful Speed: Forfeiture of Right-of-Way

**The driver of any vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have had. In such event, each driver is required to use ordinary care for his or her own safety.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-823.

**CASE AUTHORITY:** *Rascher v. Friend, 279 Va. 370, 376, 689 S.E.2d 661, 665 (2010)*; *James v. City of Norfolk, 206 Va. 35, 37, 141 S.E.2d 748, 749 (1965)*; *Irvan v. Jamison Oil Co., 205 Va. 1, 6, 135 S.E.2d 153, 156 (1964)*; *Moore v. Warren, 203 Va. 117, 122–23, 122 S.E.2d 879, 883–84 (1961)*; *Shearin v. Virginia Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944)*; *Temple v. Ellington, 177 Va. 134, 142, 12 S.E.2d 826, 828–29 (1941)*; *Temple v. Moses, 175 Va. 320, 8 S.E.2d 262 (1940)*.

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-823 codifies the forfeiture of right-of-way by unlawful speed. The forfeiture is of any right-of-way the driver might otherwise have had under Va. Code Ann. §§ 46.2-820–46.2-829.

### *ALERTS:*

- The decisions in *Temple v. Moses, Temple v. Ellington*, and *Irvan* held that the statutory duty to yield the right-of-way applies only to those lawfully approaching the intersection. The forfeiture of the right-of-way under Va. Code Ann. § 46.2-823 does not operate to transfer the right-of-way to another. *James, 206 Va. at 37, 141 S.E.2d at 749*; *Moore, 203 Va. at 122–23, 122 S.E.2d at 883–84*. Where the favored driver was operating at an unlawful speed, the common law duty to exercise reasonable care applied to both drivers. *Moore, 203 Va. at 122–23, 122 S.E.2d at 883–84*. When evidence of unlawful speed is presented, failure to instruct on the forfeiture of right-of-way constitutes reversible error. *Shearin, 182 Va. at 577, 29 S.E.2d at 843*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.300
## Right-of-Way: Stopping and Yielding Before Entering Highway or Crossing Sidewalk

**Immediately before** [entering a highway; crossing a sidewalk] **from a** [private road; driveway; alley; building]**, the driver of a vehicle has a duty to stop and use ordinary care to yield the right-of-way to any** [approaching vehicle that; pedestrian who] **is so near the** [intersection; sidewalk] **that the driver cannot safely** [enter; cross] **it.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-826.

**CASE AUTHORITY:** *Caplan v. Bogard, 264 Va. 219, 223, 563 S.E.2d 719, 721 (2002)*; *Van Buren v. Simmons, 235 Va. 46, 49, 365 S.E.2d 746, 748 (1988)*; *Seawell v. Carmines, 207 Va. 294, 297, 149 S.E.2d 903, 905–06 (1966)*; *Irvan v. Jamison Oil Co., 205 Va. 1, 5–6, 135 S.E.2d 153, 156 (1964)*; *Temple v. Ellington, 177 Va. 134, 142, 12 S.E.2d 826, 828–29 (1941)*; *Temple v. Moses, 175 Va. 320, 331–32, 8 S.E.2d 262, 266 (1940).*

### PRACTICE COMMENTARY

Instruction No. 10.020, Lookout: Scope of Duty to Keep a Proper Lookout, should be given with this instruction. See *Kelley v. Henley, 208 Va. 264, 268, 156 S.E.2d 618, 621 (1967).*

In *Caplan, 264 Va. at 228–29, 563 S.E.2d at 724*, the Court found the entrance to a restaurant to be a private road, not a "highway" within the meaning of Va. Code Ann. § 46.2-100, and ruled it was error to refuse to give this instruction.

☞ ***PRACTICE POINTER:*** The instruction is appropriate only for intersections not controlled by a traffic signal. Va. Code Ann. § 46.2-826.

### *ALERTS:*

- The decisions in *Temple v. Moses*, *Temple v. Ellington*, and *Irvan* placed a limitation on the statutory duty, holding that Va. Code Ann. § 46.2-826 creates a duty to yield the right-of-way only to those lawfully approaching so near the intersection that it is unsafe to enter it. *Irvan, 205 Va. at 5–6, 135 S.E.2d at 156*; *Temple v. Ellington, 177 Va. at 142, 12 S.E.2d at 828–29*; *Temple v. Moses, 175 Va. at 331–32, 8 S.E.2d at 266.*

- The driver of a vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have. Va. Code Ann. § 46.2-823. The forfeiture of the right-of-way to another under Va. Code Ann. § 46.2-823 does not operate to transfer the right-of-way to another. *James v. City of Norfolk, 206 Va. 35, 37, 141 S.E.2d 748, 749 (1965)*; *Moore v. Warren, 203 Va. 117, 122–123, 122 S.E.2d 879, 883–84 (1961).* Where the favored driver was operating at an unlawful speed, the common law duty to exercise reasonable care applied to both drivers. *Moore, 203 Va. at 122–23, 122 S.E.2d at 883–84.* When evidence of unlawful speed is presented, failure to instruct on the forfeiture of right-of-way constitutes reversible error. *Shearin v. Virginia Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944).* For an instruction on unlawful speed and forfeiture, see Instruction No. 10.295, Unlawful Speed: Forfeiture of Right-of-Way.

***RESEARCH REFERENCES:***

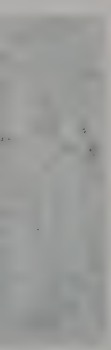
Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3



## Instruction No. 10.310
## Right-of-Way: Traffic Circles

**Vehicles already in a traffic circle have the right-of-way over vehicles entering the circle.**

**If the driver of a vehicle entering a traffic circle fails to yield the right-of-way, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-822.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The driver of a vehicle traveling at an unlawful speed forfeits any right-of-way he might otherwise have. Va. Code Ann. § 46.2-823. The forfeiture of the right-of-way under Va. Code Ann. § 46.2-823 does not operate to transfer the right-of-way to another. *James v. City of Norfolk, 206 Va. 35, 37, 141 S.E.2d 748, 749 (1965)*; *Moore v. Warren, 203 Va. 117, 122–23, 122 S.E.2d 879, 883–84 (1961)*. Each driver is then required to use ordinary care for his own safety. *Moore, 203 Va. at 123, 122 S.E.2d at 884*. When evidence of unlawful speed is presented, failure to instruct on the forfeiture of right-of-way constitutes reversible error. *Shearin v. Virginia Elec. & Power Co., 182 Va. 573, 577, 29 S.E.2d 841, 843 (1944)*. For an instruction on unlawful speed and forfeiture, see Instruction No. 10.295, Unlawful Speed: Forfeiture of Right-of-Way.

### *ALERTS:*

- This instruction may need to be modified if the involved circular intersection has traffic control devices. Va. Code Ann. § 46.2-822.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.320
## Driver's Duty Not to Stop on Highway

**The driver of a vehicle has a duty not to stop his vehicle in such a manner as to impede or render dangerous the use of the highway by others who are using it unless there was** [an emergency; an accident; a mechanical breakdown]**.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-888.

**CASE AUTHORITY:** *Hot Shot Express, Inc. v. Brooks, 264 Va. 126, 133–34, 563 S.E.2d 764, 767–69 (2002)*; *Harrah v. Washington, 252 Va. 285, 295, 477 S.E.2d 281, 287 (1996)*; *Thomas v. Settle, 247 Va. 15, 22, 439 S.E.2d 360, 364–65 (1994)*; *Pullen v. Nickens, 226 Va. 342, 347–49, 310 S.E.2d 452, 455–56 (1983)*; *Riggle v. Wadell, 216 Va. 577, 580, 221 S.E.2d 142, 144–45 (1976)*; *Cox v. Mabe, 214 Va. 705, 706–07, 204 S.E.2d 253, 255 (1974)*; *Elliott v. Lewis, 207 Va. 361, 364–65, 150 S.E.2d 129, 131–32 (1966)*; *Birtcherd Dairy, Inc. v. Edwards, 197 Va. 830, 833–34, 91 S.E.2d 421, 423–24 (1956)*; *Doss v. Rader, 187 Va. 231, 238–39, 46 S.E.2d 434, 437–38 (1948)*.

### PRACTICE COMMENTARY

Violation of Va. Code Ann. § 46.2-888 is negligence per se. *Hot Shot Express, Inc., 264 Va. at 134, 563 S.E.2d at 769*; *Birtcherd Dairy, 197 Va. at 833, 91 S.E.2d at 423*. But see Instruction No. 10.330, Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway; *Moore v. Virginia Transit Co., 188 Va. 493, 500, 50 S.E.2d 268, 272 (1948)* (holding that the statute incorporates common law duty). However, violation of Va. Code Ann. § 46.2-888 is not negligence per se where the defendant is an employee of the Virginia Department of Transportation or of a locality engaged in roadwork. Va. Code Ann. § 46.2-891. In such circumstances, the common law standard of reasonable care will be applied. *Pullen, 226 Va. at 348–49, 310 S.E.2d at 455–56.*

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 46.2-892 exempts rural mail carriers from the requirements of Va. Code Ann. § 46.2-888 if their vehicles meet the statutory requirements.

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 46.2-893 allows trucks, buses, and school buses to stop on the highway under certain conditions. See Instruction No. 12.030, Stopping on Highway to Pick Up or Discharge Students Permitted.

### *ALERTS:*

- The statute is not applicable when a driver momentarily stops his car to avoid an accident. *Doss, 187 Va. at 238–39, 46 S.E.2d at 438*. The statute is also not applicable when a driver momentarily stops his vehicle while making a left turn to avoid a collision with oncoming traffic. *Lerwill v. Regent Van & Storage, Inc., 217 Va. 490, 494, 229 S.E.2d 880, 883 (1976)*. The question for the jury is not whether stopping was reasonable, but whether stopping impeded the highway or made it dangerous. *Birtcherd Dairy, Inc., 197 Va. at 834, 91 S.E.2d at 424*. Va. Code Ann. § 46.2-891 exempts highway construction and maintenance vehicles from the statutory provisions relating to stopping on highways.

- In the event of an emergency, accident, or mechanical breakdown, the jury should be further instructed by Instruction 10.350, Driver's Duty When Stopping on Highway Because of Accident, of the defendant's additional statutory duty to move his vehicle from the roadway as soon as possible. *Harrah, 252 Va. at 295,*

*477 S.E.2d at 287.* There is also a related requirement to turn on emergency flashing lights if the vehicle is so equipped and they are in working order. Va. Code Ann. § 46.2-888(B). See Instruction No. 10.350.

- Drivers of vehicles involved in accidents on Interstate 66 where a HOT lane is under construction and the shoulders are being or have been removed have specific duties regarding post-accident vehicle movement. Va. Code Ann. § 46.2-888(C). This subsection expires upon the certification by the Secretary of Transportation that the HOT lane construction on Interstate 66 is complete.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

**Instruction No. 10.330**

**Driver's Duty to Use Ordinary Care to Avoid Obstructing the Highway**

**The driver of a vehicle has a duty to use ordinary care to avoid obstructing the street or highway with his vehicle in a way that may be dangerous to others.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Moore v. Virginia Transit Co., 188 Va. 493, 499–500, 50 S.E.2d 268, 271–72 (1948).*

### PRACTICE COMMENTARY

This instruction states the common law duty; it is only appropriate when the plaintiff relies on a general negligence standard and not on a statutory provision. *Moore, 188 Va. at 500, 50 S.E.2d at 272.* Driving too slowly may also be negligence. Va. Code Ann. § 46.2-877. See Instruction No. 10.090, Speed: Posted Minimum; Instruction No. 10.100, Speed: Driving Too Slowly.

### *ALERTS:*

- Momentary stopping to avoid an accident or collision or when turning left is not negligence, although a jury question may exist as to whether such stopping was reasonable under the existing circumstances. *Lerwill v. Regent Van & Storage, Inc., 217 Va. 490, 494–95, 229 S.E.2d 880, 883–84 (1976)*; *Doss v. Rader, 187 Va. 231, 238–39, 46 S.E.2d 434, 438 (1948).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.340
## Driver's Duty When Stopping to Sell Merchandise

**The driver of a vehicle from which merchandise is sold has a duty to use ordinary care in selecting a place to park his vehicle so that he can sell his merchandise without exposing his customers to danger.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Saulsbury v. Williams, 205 Va. 727, 730–31, 139 S.E.2d 816, 818–19 (1965)*; *Vought v. Jones, 205 Va. 719, 724–25, 139 S.E.2d 810, 814 (1965).*

### PRACTICE COMMENTARY

This instruction states the common law duty of a driver who sells merchandise from his vehicle. See *Vought, 205 Va. at 723–24, 139 S.E.2d at 814–15.* The plaintiff also may have a cause of action under Va. Code Ann. § 46.2-888. *Saulsbury, at 730–31, 139 S.E.2d at 818–19.* See Instruction No. 10.320, Driver's Duty Not to Stop on Highway.

### *ALERTS:*

- It is negligence for a pedestrian to step into a highway from behind an obstruction. Va. Code Ann. § 46.2-926. See Instruction No. 14.020, Pedestrian's Duty Not to Step Into Street From Behind an Obstruction. As to the higher duty to avoid danger to children, see Instruction No. 6.010.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.350
## Driver's Duty When Stopping on Highway Because of Accident

**A driver whose vehicle is stopped on a roadway because he was involved in** [an emergency; an accident; mechanical breakdown] **must turn on the emergency flashing lights of his vehicle, if they are in working order, and move his vehicle from the roadway to the shoulder as soon as possible.**

**If a driver fails to perform either or both of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-888.

**CASE AUTHORITY:** *Hot Shot Express, Inc. v. Brooks, 264 Va. 126, 133–34, 563 S.E.2d 764, 767–68 (2002)*; *Harrah v. Washington, 252 Va. 285, 295, 477 S.E.2d 281, 287 (1996).*

### PRACTICE COMMENTARY

The Statute imposes an additional requirement that a vehicle disabled in an emergency, accident, or mechanical breakdown and moved to the shoulder shall be "removed from the shoulder without unnecessary delay." Va. Code Ann. § 46.2-888. Where applicable, the instruction should be modified to incorporate that element.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

## Instruction No. 10.360
## Certain Stopped Vehicles; Duty to Set Out Warning Devices

**When** [a; an] (type of commercial vehicle defined in Va. Code Ann. § 46.2-341.4) **is stopped on any roadway or on the shoulder of any highway at any time for any cause other than stops necessary to comply with traffic control devices, lawfully installed signs, or signals of law-enforcement officers, the driver must immediately activate the vehicular hazard warning signal flashers, and, as soon as possible, but in any event within ten (10) minutes of stopping, place on the roadway or shoulder three reflectorized triangular warning devices. One red reflectorized triangular warning device shall be placed in the center of the lane of traffic or shoulder occupied by the stopped vehicle and not less than 100 feet from the vehicle in the direction of traffic approaching in that lane. One red reflectorized triangular warning device shall be placed not less than 100 feet from the vehicle in the opposite direction. The third red reflectorized triangular warning device shall be placed on the traffic side of the vehicle not closer than ten (10) feet from the** [front; rear]**. The hazard warning signal flashers shall continue to flash until the red reflectorized triangular warning devices have been placed.**

**If the driver of the vehicle fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-111(A).

**CASE AUTHORITY:** *Roberts v. Mundy, 208 Va. 236, 239–40, 156 S.E.2d 593, 596–97 (1967)*; *Savage Truck Line v. Traylor, 193 Va. 579, 585, 69 S.E.2d 478, 482 (1952).*

### PRACTICE COMMENTARY

The statutory requirements are mandatory. The statute must be reviewed with care because of its complexity. The requirements for placing the warning devices vary depending upon where the commercial vehicle is stopped in relation to a curve or a crest of a hill. The placement of the warning devices is not required within the corporate limits of cities under certain circumstances. Flares or torches may be used in lieu of red reflectorized warning devices under certain circumstances. There are specific requirements for commercial vehicles used to carry flammable liquids or gases. Va. Code Ann. § 46.2-111(B). The Committee, in drafting this instruction, decided to use a single example taken from Va. Code Ann. § 46.2-111(A) instead of attempting to incorporate all possible alternatives in one instruction.

However, whether a violation of Va. Code Ann. § 46.2-111(A) has occurred can be determined only after examining "the length of time, prior to an accident, that a truck had been standing on a highway without the deployment of warning devices." *Kimberlin v. PM Transport, Inc., 264 Va. 261, 269, 563 S.E.2d 665, 669 (2002).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.01, 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.12, 2.25

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 5; 12 through 126.3

# Chapter 11

# MOTOR VEHICLES—EMERGENCY VEHICLES

## Scope Note

**Instruction No. 11.000** **Standard of Care: Operator Entitled to Sovereign Immunity**

**Instruction No. 11.005** **Standard of Care: Operator Not Entitled to Sovereign Immunity**

**Instruction No. 11.010** **Speed Limits: Operator Entitled to Sovereign Immunity**

**Instruction No. 11.020** **Certain Traffic Regulations: Operator Entitled to Sovereign Immunity**

**Instruction No. 11.030** **Driver's Duty to Yield to Emergency Vehicle**

**Instruction No. 11.035** **Driver's Duty to Make Lane Change**

# SCOPE NOTE

"Emergency vehicle" is defined in Va. Code Ann. § 46.2-920(C). An initial determination must first be made that the vehicle in question qualifies under the statute as an emergency vehicle being used in the performance of public service and operated under emergency conditions.

Instruction No. 11.000 specifies the standard of care generally applicable to a government agent operating an emergency vehicle in situations where it has been determined that such operator is entitled to sovereign immunity. Instruction Nos. 11.010 and 11.020 are the instructions with regard to speed limits and certain other traffic regulations when the emergency vehicle operator is entitled to sovereign immunity.

Instruction No. 11.005 specifies the standard of care that applies to the emergency vehicle operator who is not entitled to invoke the defense of sovereign immunity.

Instruction No. 11.030 covers the duty of other motorists to respond to approaching emergency vehicles by pulling over and stopping.

Instruction No. 11.035 covers a driver's duty to yield the right-of-way by changing lanes or to maintain a safe speed when approaching stationary emergency vehicles.

Va. Code Ann. § 46.2-100 defines "motor vehicle" broadly to include every self-propelled "vehicle." Certain "vehicles," e.g., bicycles and mopeds that travel at speeds of 35 m.p.h. or less, are excepted from the definition of "motor vehicles." Va. Code Ann. § 46.2-801 makes the "Regulation of Traffic" Chapter applicable to all vehicles regardless of ownership unless there is a specific statutory exclusion.

The primary effect of Va. Code Ann. § 46.2-920 is to provide such a specific statutory exemption. Pursuant to the statute, the operator of certain types of emergency vehicles is not subject to criminal prosecution for the violation of certain traffic regulations under certain conditions. The operator is not, however, exempt from criminal prosecution when he recklessly disregards the safety of persons and property. Nor is the operator exempt from civil liability for failure to use reasonable care in the operation of the vehicle. Va. Code Ann. § 46.2-920(B).

The degree of negligence for which an operator of an emergency vehicle being used in the performance of public service and operated under emergency conditions is held accountable generally depends upon whether or not the operator is entitled to sovereign immunity. *Couplin v. Payne, 270 Va. 129, 135–36, 613 S.E.2d 592, 595 (2005).* The question of whether or not sovereign immunity applies is one for the court. The four factors that determine entitlement to sovereign immunity are: (1) the nature of the function the employee performed; (2) the extent of the government's interest and involvement in the function; (3) the degree of control and direction exercised over the employee by the government; and (4) whether the act in question involved the exercise of discretion and judgment. *James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).* In *Colby v. Boyden, 241 Va. 125, 129–30, 400 S.E.2d 184, 186–87 (1991)*, the Court applied the four-pronged test and found that a police officer involved in a vehicular pursuit was engaged in a discretionary act and thus entitled to sovereign immunity. See also *McBride v. Bennett, 288 Va. 450, 457–58, 764 S.E.2d 44, 48 (2014)* (sovereign immunity barred an estate administrator's wrongful death action against two police officers because the officers exercised their judgment and discretion in responding to a

domestic disturbance call in an emergency manner; determining the proper response to a criminal act and implementing that response clearly involved the exercise of judgment and discretion in the performance of a governmental function, and the exercise of judgment and discretion, even if it violated police department policy, allowed for the invocation of sovereign immunity). In *Stanfield v. Peregoy, 245 Va. 339, 343–44, 429 S.E.2d 11, 13–14 (1993)*, a city employee operating a snow plow/salt truck during a snow emergency was entitled to sovereign immunity.

In *Friday-Spivey v. Collier, 268 Va. 384, 390–91, 601 S.E.2d 591, 594–95 (2004)*, a county employee responding in a fire truck to a dispatch involving an infant locked in a vehicle was not entitled to sovereign immunity. In 2015, the General Assembly added Va. Code Ann. § 8.01-225.3, which provides immunity for first responders en route to an emergency. The statute extends immunity from liability for injury to persons or property, except for gross negligence or for willful or wanton misconduct, to volunteer firefighters or volunteer emergency medical services personnel arising out of the operation of an emergency vehicle, if certain conditions are met. This immunity provided by the statute is in addition to, not in lieu of, any other state or federal immunity.

When a government agent operating an emergency vehicle is entitled to sovereign or statutory immunity, the plaintiff must establish gross negligence (or willful or wanton negligence), in order to prevail. Instruction No. 11.000 sets forth this requirement. When the operator of an emergency vehicle is not entitled to the defense of sovereign immunity, the plaintiff must prove only simple negligence in order to prevail. Instruction No. 11.005 recites this standard of negligence, but it should be noted that the reasonable care that an emergency vehicle operator must use differs from the ordinary care required of other motor vehicle operators. The emergency-vehicle operator must use the care that "a prudent man in the discharge of official duties of a like nature under like circumstances" would use. *Smith v. Lamar, 212 Va. 820, 824, 188 S.E.2d 72, 75 (1972).*

Instruction No. 11.000 may be used as a guide to craft an instruction where sovereign or statutory immunity is applicable and gross negligence is alleged. Instruction No. 4.040 may be used as a guide when willful or wanton misconduct is alleged. Citations to cases distinguishing willful negligence from wanton negligence may be found in the Practice Commentary and Alerts following Instruction No. 4.040. A note discussing how the Supreme Court of Virginia has distinguished gross negligence from willful-and-wanton conduct and reckless conduct, is provided in the Practice Commentary to Instruction No. 11.000. That guidance is also pertinent to the other instructions in this chapter referring to gross negligence: Instructions Nos. 11.010 (Speed Limits: Operator Entitled to Sovereign Immunity), and 11.020 (Certain Traffic Regulations: Operator Entitled to Sovereign Immunity).

In using the instructions in this chapter or in drafting other instructions, consider the following items:

(1) Is the operator of the emergency vehicle entitled to the defense of sovereign immunity?

(2) Is the emergency vehicle that was involved one of those covered by the limited statutory exemptions?

(3) Was the operator of the vehicle engaged in official conduct of the type

covered by the statute?

(4) Was the operator sounding the appropriate warning device and displaying the appropriate warning lights?

Unless the operator of the emergency vehicle is covered by sovereign immunity or by a statutory exemption, the general rules of the road rather than the specialized rules pertaining to operators of emergency vehicles would be applicable.

These instructions can be modified to cover the exemptions granted to operators of tow trucks or vehicles owned or controlled by the Virginia Department of Transportation (Va. Code Ann. § 46.2-920.1) or operators of vehicles owned or controlled by the Wildlife Center of Virginia (Va. Code Ann. § 46.2-920.2).

## Instruction No. 11.000
## Standard of Care: Operator Entitled to Sovereign Immunity

**The driver of a** (type of emergency vehicle) **has a duty not to be grossly negligent in discharging his official duties under the circumstances of this case.**

**"Gross negligence" is that degree of negligence which shows such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of another** [person; person's property]**. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Burns v. Gagnon, 283 Va. 657, 677–78, 727 S.E.2d 634, 646–47 (2012)*; *Hawthorne v. VanMarter, 279 Va. 566, 586, 692 S.E.2d 226, 239 (2010)*; *Green v. Ingram, 269 Va. 281, 290–91, 608 S.E.2d 917, 922 (2005)*; *Nationwide Mut. Ins. v. Hylton, 260 Va. 56, 64, 530 S.E.2d 421, 424 (2000)*; *Smith v. Settle, 254 Va. 348, 353–54, 492 S.E.2d 427, 430–31 (1997)*; *Stanfield v. Peregoy, 245 Va. 339, 342–43, 429 S.E.2d 11, 13 (1993)*; *Colby v. Boyden, 241 Va. 125, 131–33, 400 S.E.2d 184, 188–89 (1991)*; *Heider v. Clemons, 241 Va. 143, 144, 400 S.E.2d 190, 190 (1991)*; *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 414, 404 S.E.2d 216, 222 (1991)*; *Meagher v. Johnson, 239 Va. 380, 383, 389 S.E.2d 310, 311 (1990).*

### Practice Commentary

See the Scope Note for a discussion of the standards of care applicable to the operators of emergency vehicles.

**Gross Negligence and Willful Negligence Distinguished.** Virginia recognizes three levels of negligence: simple negligence, gross negligence and willful and wanton negligence. *Cowan v. Hospice Support Care, Inc., 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004)*; *Infant C. v. Boy Scouts of America, Inc., 239 Va. 572, 582, 391 S.E.2d 322, 327 (1990).*

"The first level, simple negligence, involves the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. *Gossett v. Jackson, 249 Va. 549, 554, 457 S.E.2d 97, 100 (1995)*; *Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 212–13 (1984).*

"The second level, gross negligence, is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness. *Koffman v. Garnett, 265 Va. 12, 15, 574 S.E.2d 258, 260 (2003)*; *Griffin, 227 Va. at 321, 315 S.E.2d at 213*; *Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).*

"The third level of negligent conduct is willful and wanton negligence. This conduct is defined as 'acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.' " *Etherton v. Doe, 268 Va. 209, 213–14, 597 S.E.2d 87, 90 (2004)*; see also *Alfonso v. Robinson, 257 Va. 540, 545, 514 S.E.2d 615, 618 (1999).*

"As these definitions illustrate, there are fundamental distinctions separating acts or omissions of simple negligence from those of gross negligence and willful and wanton negligence."

*Cowan, 268 Va. at 486–87, 603 S.E.2d at 918.*

The definition of "gross negligence" used in this instruction is the same as the definition used in Instruction No. 4.030, Definition of Gross Negligence.

The term "willful recklessness" used in this instruction is one of several terms used by the Court to describe "willful and wanton" conduct. *Infant C., 239 Va. at 581, 391 S.E.2d at 327.* Instruction No. 4.040, Definition of Willful and Wanton Conduct, may be utilized if there is a need to distinguish between the two. The Practice Commentary and Alerts following Instruction No. 4.040 provide citations to cases distinguishing the various types of negligence, as well as to cases involving corollary principles such as the definition of contributory negligence, the types of damages that may be recovered, and statutory presumptions that may pertain.

***ALERTS:***

- This standard generally applies only where the operator is entitled to sovereign immunity. *Colby, 241 Va. at 128, 400 S.E.2d at 186.* Va. Code Ann § 8.01-225.3, however, cloaks volunteer firefighters and emergency medical services personnel with statutory immunity, under certain specified conditions, except for acts of gross negligence or willful or wanton misconduct. The statutory immunity is in addition to, not in lieu of, any other applicable immunity provided by state or federal law, including the sovereign immunity extended to volunteers by Va. Code Ann. § 2.2-3605.

- In a situation to which Va. Code Ann. § 8.01-225.3 is applicable, Instruction No. 11.000 may be used as a guide to craft an appropriate instruction. Instruction No. 4.040 may be used as a guide when willful or wanton misconduct is alleged in such situations.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 11 & 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.02, 26.08, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, §§ 2.29 through 2.31

Kent Sinclair, VIRGINIA REMEDIES § 2.4

MICHIE'S JURISPRUDENCE, Counties § 84; Municipal Corporations §§ 102, 105; Negligence §§ 4, 6; Public Officers § 49; State §§ 25, 26

## Instruction No. 11.005
## Standard of Care: Operator Not Entitled to Sovereign Immunity

**The driver of a** (type of emergency vehicle) **has a duty to use the degree of care that a prudent man would use in discharging his official duties under the circumstances of this case.**

**If the driver of a** (type of emergency vehicle) **fails to use this degree of care, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-920.

**CASE AUTHORITY:** *Hawthorne v. VanMarter, 279 Va. 566, 585–86, 692 S.E.2d 226, 238–39 (2010)*; *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 411–12, 404 S.E.2d 216, 221 (1991)*; *Heider v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991)*; *Colby v. Boyden, 241 Va. 125, 131, 400 S.E.2d 184, 188 (1991)*; *Meagher v. Johnson, 239 Va. 380, 383–84, 389 S.E.2d 310, 311 (1990)*; *Smith v. Lamar, 212 Va. 820, 824, 188 S.E.2d 72, 74–75 (1972)*.

### PRACTICE COMMENTARY

The court in *Smith v. Lamar* held that, although a policeman chasing a traffic offender is not bound by the speed limit, he still must act as a "prudent man in the discharge of official duties of a like nature under like circumstances" would act. The court held that it was not error to refuse to give an instruction based on ordinary care. *212 Va. at 823–24, 188 S.E.2d at 73–75.*

☞ ***PRACTICE POINTER:*** See the Scope Note for a discussion of the standards of care applicable to the operators of emergency vehicles.

☞ ***PRACTICE POINTER:*** Consult Va. Code Ann. § 46.2-920 for the requirements regarding warning lights, etc., and the exemptions from traffic laws.

### *ALERTS:*

- This instruction is to be used when the emergency vehicle operator is not entitled to sovereign immunity but is displaying proper warning lights and sirens and is engaged in conduct entitling him to limited exemptions from the traffic laws.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 11 & 21.

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.02, 26.08, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, §§ 2.29 through 2.31

Kent Sinclair, VIRGINIA REMEDIES § 2.4

MICHIE'S JURISPRUDENCE, Counties § 84; Municipal Corporations §§ 102, 105; Negligence §§ 4, 6; Public Officers § 49; State §§ 25, 26

## Instruction No. 11.010
## Speed Limits: Operator Entitled to Sovereign Immunity

**The driver of a vehicle responding to an emergency call may exceed the speed limit provided he is not grossly negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-920.

**CASE AUTHORITY:** *Hawthorne v. VanMarter, 279 Va. 566, 585–86, 692 S.E.2d 226, 238–39 (2010)*; *Smith v. Settle, 254 Va. 348, 353–54, 492 S.E.2d 427, 430 (1997)*; *Colby v. Boyden, 241 Va. 125, 132–33, 400 S.E.2d 184, 188–89 (1991).*

### PRACTICE COMMENTARY

This instruction covers only the authorization of an emergency vehicle to exceed the speed limit. This instruction may be modified to cover other exemptions granted by Va. Code Ann. § 46.2-920. See Instruction No. 11.020.

For a description of "gross negligence" and guidance as to its meaning, see Instruction No. 11.000 and the Sources & Authority statement for that instruction.

☞ ***PRACTICE POINTER:*** See the Scope Note for a general discussion of operator entitlement to sovereign immunity and Instruction No. 11.005 covering operators not entitled to sovereign immunity.

### *ALERTS:*

- This instruction is generally applicable only when the operator is entitled to sovereign immunity, and, thus, gross negligence is the governing standard. *Colby, 241 Va. at 128, 130–33, 400 S.E.2d at 186, 187–89.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 11 & 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.02, 26.08, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, §§ 2.29 through 2.31

Kent Sinclair, VIRGINIA REMEDIES § 2.4

MICHIE'S JURISPRUDENCE, Counties § 84; Municipal Corporations §§ 102, 105; Negligence §§ 4, 6; Public Officers § 49; State §§ 25, 26

## Instruction No. 11.020
## Certain Traffic Regulations: Operator Entitled to Sovereign Immunity

**The driver of a** (type of emergency vehicle) **responding to an emergency call may proceed past a red light provided he is not grossly negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-920.

**CASE AUTHORITY:** *Smith v. Settle, 254 Va. 348, 353–54, 492 S.E.2d 427, 430 (1997)*; *Colby v. Boyden, 241 Va. 125, 130–33, 400 S.E.2d 184, 187–89 (1991).*

## PRACTICE COMMENTARY

This instruction covers an emergency vehicle that has run a red light. This instruction may be modified to cover other exemptions granted by Va. Code Ann. § 46.2-920. See Instruction No. 11.010.

In appropriate cases, the phrase "who is chasing or apprehending violators of the law" or "who is chasing or apprehending persons charged with or suspected of violating the law" may be substituted for "who is responding to an emergency call." Also, "stop sign" or "device indicating traffic shall stop" may be substituted for "red light." "Blinking" or "alternating" may be substituted for "flashing." "Exhaust whistle" or "air horn" may be substituted for "siren."

For a description of "gross negligence" and guidance as to its meaning, see Instruction No. 11.000 and the Sources & Authority statement for that instruction.

☞ ***PRACTICE POINTER:*** See the Scope Note for a general discussion of operator entitlement to sovereign immunity and Instruction No. 11.005 covering operators not entitled to sovereign immunity.

***ALERTS:***

- This instruction is generally applicable only when the operator is entitled to sovereign immunity, and, thus, gross negligence is the governing standard. *Colby, 241 Va. at 130–33, 400 S.E.2d at 187–89.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 11 & 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.02, 26.08, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, §§ 2.29 through 2.31

Kent Sinclair, VIRGINIA REMEDIES § 2.4

MICHIE'S JURISPRUDENCE, Counties § 84; Municipal Corporations §§ 102, 105; Negligence §§ 4, 6; Public Officers § 49; State §§ 25, 26

## Instruction No. 11.030
## Driver's Duty to Yield to Emergency Vehicle

**When a** (type of emergency vehicle) **approaches giving an audible signal by** [siren; exhaust whistle; air horn designed to give automatically intermittent signals] **and displaying a** [flashing; blinking; alternating; steady burning] (color as provided in Va. Code Ann. §§ 46.2-1022, 46.2-1023 or 46.2-1024) **warning light, the driver of a vehicle has a duty, as quickly as traffic and other highway conditions permit, to drive to the nearest edge of the roadway** [clear of any intersection of highways]**, and to stop and remain in that position until such vehicle has passed before proceeding** [unless otherwise directed by a police or traffic officer]**.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-829, 46.2-920, 46.2-1022 (warning lights for law-enforcement vehicles and certain vehicles of the Department of Military Affairs, Virginia National Guard, and Department of Corrections); Va. Code Ann. § 46.2-1023 (warning lights for fire apparatus, forest-warden vehicles, emergency-medical-services vehicles, vehicles of the Department of Emergency Management, vehicles of the Office of Emergency Medical Services, vehicles of the Department of Environmental Quality, other specified vehicles of the Virginia National Guard, animal warden vehicles, specified private-security vehicles, and certain special conservators of the peace and policeman); Va. Code Ann. § 46.2-1024 (warning lights for a vehicle owned by a member of a fire department, volunteer fire company, or volunteer emergency-medical services, and any police chaplain).

**CASE AUTHORITY:** *Virginia Transit Co. v. Tidd, 194 Va. 418, 423–24, 73 S.E.2d 405, 408–09 (1952).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- For a discussion of the duty of the emergency vehicle operator to drive with due regard for the safety of others, see *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 404 S.E.2d 216 (1991); Heider v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991).*

- Pursuant to the express provisions of Va. Code Ann. § 46.2-829, the instruction is applicable only to those emergency vehicles defined in Va. Code Ann. § 46.2-920(C). Va. Code Ann. § 46.2-920 was amended in 1994 to delete a prior reference to certain privately owned vehicles equipped with warning lights as are listed in Va. Code Ann. § 46.2-1024. The deletion of the reference to those vehicles therefore excludes them from the definition of "emergency vehicles" now set forth in Va. Code Ann. § 46.2-920(C). Because the vehicles no longer fall within the definition of "emergency vehicles" pursuant to Va. Code Ann § 46.2-920(C), a driver's duty to yield, as set forth in Va. Code Ann. § 46.2-829, and in this Instruction, would not apply to such vehicles, even though the vehicles are equipped with the type of warning lights permitted by Va. Code Ann. § 46.2-1024. Va. Code Ann. § 46.2-829 has not been amended, however, to delete its now superfluous reference to the types of warning lights listed in Va. Code Ann. § 46.2-1024.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 27

## Instruction No. 11.035
## Driver's Duty to Make Lane Change

**The driver of any motor vehicle, upon approaching a stationary vehicle that is displaying a flashing, blinking, or alternating blue, red, or amber light or other warning lights has a duty to (i) proceed with caution and, if reasonable, with due regard for safety and traffic conditions, yield the right-of-way by making a lane change into a lane not adjacent to the stationary emergency vehicle or, if changing lanes would be unreasonable or unsafe, (ii) proceed with due caution and maintain a safe speed for highway conditions.**

**If the driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-861.1.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction applies only to a vehicle on a highway having at least four lanes, at least two of which are intended for traffic proceeding in the same direction as the approaching vehicle. Va. Code Ann. § 46.2-861.1.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 27

# Chapter 12

# MOTOR VEHICLES—SCHOOL BUSES



## Scope Note

**Instruction No. 12.000** School-Bus Driver's Duty to Use Warning Device

**Instruction No. 12.010** School-Bus Driver's Duty When Picking Up or Discharging Students

**Instruction No. 12.030** Stopping on Highway to Pick Up or Discharge Students Permitted

**Instruction No. 12.040** Duty of a Driver Approaching School Bus That Is Stopped to Pick Up or Discharge Students

**Instruction No. 12.050** Duty of Driver Approaching School Bus Stopped for Another Reason

**Instruction No. 12.060** Approaching Driver's Duty of Care

**Instruction No. 12.070** Approaching Driver Has No Duty to Stop: Divided Highway

# SCOPE NOTE

These instructions cover both the liability of the school-bus driver and the liability of other drivers in accidents involving the operation of a school bus. You should also consult the instructions in Chapter 6, Contributory Negligence and Assumption of the Risk regarding children and contributory negligence, found in Instruction Nos. 6.005 through 6.030.

"School bus" is defined in Va. Code Ann. § 46.2-100; the paint and lettering requirements are set out in Va. Code Ann. § 46.2-1089; and the warning devices required are stated in Va. Code Ann. § 46.2-1090. No instructions on these aspects are included here since whether or not a vehicle meets the statutory definition generally is a question of law.

A local school board may be sued jointly with the school bus driver. See Va. Code Ann. § 22.1-194; *County Sch. Bd. v. Thomas, 201 Va. 608, 609, 112 S.E.2d 877, 879 (1960).* The common law principle that the liabilities of principals and agents are coterminous is not applicable when altered by the General Assembly. *Schwartz v. Brownlee, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997).* Va. Code Ann. § 22.1-194 subjects a school board to limited liability for injuries incurred through the acts of its employee school bus drivers. The statute does not require that the school board and its employee be sued jointly, and it allows a plaintiff to proceed solely against the school board. In enacting Va. Code Ann. § 22.1-194, the General Assembly created an exception to the common-law principle recited above and imposed liability on a school board for simple negligence, even if its employee is liable only for acts of gross negligence. *Linhart v. Lawson, 261 Va. 30, 33–34, 540 S.E.2d 875, 876–77 (2001).* Recovery against the school board is limited to the amount of valid and collectable insurance in force at the time of the accident; or, if the school board is a self-insurer, to the amount set out in Va. Code Ann. § 22.1-190. A school board is not entitled to take advantage of the liability limit provided by Va. Code Ann. § 22.1-190(A) if it has not obtained a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles, as required by Va. Code Ann. § 22.1-190(D). *Frederick County Sch. Bd. v. Hannah, 267 Va. 231 237–39, 590 S.E.2d 567, 570–71 (2004).*

With minor exceptions, school-bus drivers are bound, in their relations with other drivers, by the rules that govern all drivers. For three exceptions, see Va. Code Ann. § 46.2-871, which prescribes a lower than normal speed limit for school buses, Va. Code Ann. § 46.2-893, which allows school buses to stop on the highway when taking on or discharging school children, and Va. Code Ann § 46.2-919.1, which prohibits the use of wireless telecommunications devices by school-bus drivers under certain circumstances.

For a case upholding a finding of negligence in favor of a child passenger against a school-bus driver, see *County Sch. Bd. v. Thomas, 201 Va. at 612, 112 S.E.2d at 881.*

There are special duties that school-bus drivers and other drivers have to school children when a school bus is taking on or discharging passengers; these are covered in Instructions 12.010 and 12.040. See Instruction No. 18.060, Duty of Driver of School Bus, Vehicle for Hire, or Vehicles Carrying Explosives or Flammables, for the duty of a school bus driver to stop at a railroad crossing.

Some of the statutory requirements and safeguards required for school children riding buses also apply to elderly and handicapped persons riding school buses. See Va. Code Ann. §§ 46.2-100, 46.2-859, and 46.2-1090.

## Instruction No. 12.000
## School-Bus Driver's Duty to Use Warning Device

**The driver of a school bus has a duty to use a warning device when the bus is either stopped or about to stop to take on or discharge children. The warning device shall be used and in operation** [for at least 100 feet before a proposed stop on roads with lawful speed limits less than 35 miles per hour; for at least 200 feet before a proposed stop on roads with lawful speed limits of 35 miles per hour or more].

**If a driver of a school bus fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1090.

**CASE AUTHORITY:** *County Sch. Bd. v. Thomas, 201 Va. 608, 612, 112 S.E.2d 877, 881 (1960).*

### PRACTICE COMMENTARY

Every school bus must be equipped with a warning device that indicates when the bus is stopped or about to stop to take on or discharge children. Failure of the warning device to function does not excuse a failure to stop; other motorists have a duty to stop even if the warning light is not used. Va. Code Ann. § 46.2-1090. See Instruction No. 12.040, Duty of Driver Approaching School Bus That is Stopped to Pick up or Discharge Students.

Va. Code Ann. § 46.2-1090 does not require that the warning device remain activated until all children disembarking from the bus have crossed the highway. However, in *Bickley v. Farmer, 215 Va. 484, 486, 211 S.E.2d 66, 68 (1975)*, a jury found the school bus driver liable for the wrongful death of a child who got off the bus while the warning device was operating but was struck by an approaching motorist when crossing the highway after the school bus driver had turned off the device and had begun driving off. The jury's finding that the bus driver was negligent was not challenged on appeal. See Instruction No. 12.010, School Bus Driver's Duty When Picking Up or Discharging Students.

In *County School Board, 201 Va. at 612, 112 S.E.2d at 881*, a 12-year-old child got off the bus while it was stopped for highway construction. He was struck by a construction vehicle while he was acting as flagman for another child crossing the road. Evidence that the bus driver permitted an inexperienced 12-year-old child without sufficient instructions to act as a flagman; that the driver failed to give the required statutory signal before discharging the children from the bus; and that the driver did not look in his rearview mirrors to ascertain whether there was any traffic coming from the rear that might pose a danger was held sufficient to submit the question of the bus driver's negligence to the jury and was held "ample" to support the jury's finding of negligence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.010
## School-Bus Driver's Duty When Picking Up or Discharging Students

**When discharging or picking up a child, the driver of a school bus has a duty, in addition to operating a warning device, to use ordinary care considering the experience, age, and judgment of the child.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *County Sch. Bd. v. Thomas, 201 Va. 608, 612, 112 S.E.2d 877, 881 (1960).*

### PRACTICE COMMENTARY

This instruction should be given in addition to Instruction No. 12.000, School-Bus Driver's Duty to Use Warning Device. See generally Instruction Nos. 6.005–6.030, regarding children and contributory negligence. See Instruction No. 4.000, Definition of Negligence for the definition of "ordinary care."

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.030
## Stopping on Highway to Pick Up or Discharge Students Permitted

**A school bus may be stopped on the traveled portion of the highway, when taking on or discharging school children, at points where the bus can be clearly seen for a safe distance from both directions.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-893.

**CASE AUTHORITY:** *County Sch. Bd. v. Thomas, 201 Va. 608, 612–13, 112 S.E.2d 877, 881–82 (1960).*

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-893 exempts a school-bus driver from Va. Code Ann. § 46.2-888, which prohibits stopping on a highway so as to impede the use of the highway by others. See Instruction Nos. 10.320, 10.330, and 10.350 (regarding general highway driving duties).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.040
## Duty of a Driver Approaching School Bus That Is Stopped to Pick Up or Discharge Students

**The driver of a vehicle has a duty to stop and remain stopped when approaching a school bus from any direction if the bus is stopped on any** [highway; private road; school driveway] **for the purposes of** [taking on; discharging] **children. The driver must remain stopped until all the children are clear of the** [highway; private road; school driveway] **and the bus is put in motion.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-859.

**CASE AUTHORITY:** *Bickley v. Farmer, 215 Va. 484, 489–90, 211 S.E.2d 66, 70 (1975)*; *County Sch. Bd. v. Thomas, 201 Va. 608, 612–13, 112 S.E.2d 877, 881 (1960)*.

### PRACTICE COMMENTARY

The purpose for which the bus stopped is a statutory element. The approaching driver's duty does not apply when the school bus is not stopped for the purpose of taking on or discharging children, even though a child may get off the bus during the stop. *County Sch. Bd., 201 Va. at 613, 112 S.E.2d at 881–82*. See Instruction No. 12.050, Duty of Driver Approaching School Bus Stopped for Another Reason for a driver's duties in such situations.

"Highway" is defined in Va. Code Ann. § 46.2-100, but "School Driveway" is not defined.

### *ALERTS:*

- The duty to stop exists even if the warning device does not function. Va. Code Ann. § 46.2-1090; *County Sch. Bd., 201 Va. at 612, 112 S.E.2d at 881* (decided under predecessor statute).

- The duty does not apply to a driver on a dual highway where the roadways are separated by a physical barrier or an unpaved area where the school bus is on the other roadway. Va. Code Ann. § 46.2-859. See Instruction No. 12.070, Approaching Driver Has No Duty to Stop: Divided Highway.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.050
## Duty of Driver Approaching School Bus Stopped for Another Reason

**The driver of a vehicle approaching a stopped school bus that has stopped for a purpose other than taking on or discharging school children does not have a duty to stop. He does have a duty to use ordinary care to look out for children in the vicinity of the bus and to use ordinary care to avoid any such children.**

**If a driver fails to perform either of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *County Sch. Bd. v. Thomas, 201 Va. 608, 612–13, 112 S.E.2d 877, 881–82 (1960).*

### PRACTICE COMMENTARY

In *County School Board v. Thomas*, the court approved a finding instruction involving these principles. *201 Va. at 613, 112 S.E.2d at 881–82.*

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.060
## Approaching Driver's Duty of Care

**The presence of a school bus** [taking on; preparing to take on; preparing to discharge; discharging; having discharged] **children is sufficient to put an approaching driver on notice that children may be near the bus and imposes on him a duty to exercise a degree of care in keeping with those circumstances.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Bickley v. Farmer, 215 Va. 484, 489, 211 S.E.2d 66, 70 (1975)*; *Carlton v. Martin, 160 Va. 149, 156, 168 S.E. 348, 350 (1933).*

### PRACTICE COMMENTARY

"The presence of a school bus, while taking on or discharging school children, is a warning of danger to the driver of other vehicles upon the highway . . . and imposes upon such drivers a duty of increased vigilance and care commensurate with the existing circumstances." *Bickley, 215 Va. at 489, 211 S.E.2d at 70*, *Carlton, 160 Va. at 156, 168 S.E. at 350.* See also Instruction Nos. 6.005–6.030 regarding children and contributory negligence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

## Instruction No. 12.070
## Approaching Driver Has No Duty to Stop: Divided Highway

**The driver of a vehicle approaching a school bus that is stopped for the purpose of** [taking on; discharging] **children on the opposite side of a divided highway that is separated by** [a physical barrier; an unpaved area] **may proceed without stopping if he uses ordinary care under the circumstances.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-859.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The instruction is included because, unless given, jurors might think that all drivers have a duty to stop when a school bus is taking on or discharging children, even if the bus is on the other side of a divided highway. Use of ordinary care under the circumstances, however, may require a driver to stop. See Instruction Nos. 12.050, Duty of Driver Approaching School Bus Stopped for Another Reason and 12.060, Approaching Driver's Duty of Care.

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Automobiles §§ 26, 38, 55, 81, 123

# Chapter 13

# MOTOR VEHICLES—PASSENGERS

## Scope Note

**Instruction No. 13.000** **Passenger's Duty to Warn Driver**

**Instruction No. 13.010** **Passenger's Duty When Getting Out of Vehicle**

# SCOPE NOTE

There are two instructions in this chapter on the duties of passengers. They are used when the contributory negligence of a passenger is an issue. Chapter 6, Contributory Negligence and Assumption of the Risk, will help to supplement these instructions.

Instruction No. 13.000 covers a passenger's duty to warn the driver. A parallel instruction related to a passenger's duty at railroad crossings may be found at Instruction No. 18.030, Passenger's Duty to Look and Listen. Instruction No. 13.010 deals with a passenger's duty when getting out of a vehicle.

Two instructions in another chapter deal with passengers. Instruction Nos. 15.010 and 15.020 define when a passenger is contributorily negligent or has assumed the risk of riding with an intoxicated driver.

## Instruction No. 13.000
## Passenger's Duty to Warn Driver

**A passenger in a vehicle does not have a duty to be as observant as the driver. However, a passenger does have a duty to warn the driver of a danger if:**

**(1) the passenger observes the danger; and**

**(2) it is apparent to the passenger that the driver has not seen the danger; and**

**(3) the passenger has enough time to warn the driver of the danger; and**

**(4) the passenger is so situated that he can readily warn the driver of the danger.**

**If all of these circumstances exist, and if a passenger fails to perform this duty, then he is negligent. If any one or more of the circumstances do not exist, then the passenger is not negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Major v. Hoppe, 209 Va. 193, 199–200, 163 S.E.2d 164, 168–69 (1968)*; *Mills v. Wells, 204 Va. 173, 177–78, 129 S.E.2d 705, 709 (1963)*; *Diggs v. Lail, 201 Va. 871, 875, 114 S.E.2d 743, 747 (1960).*

### PRACTICE COMMENTARY

This instruction should normally be used in conjunction with the applicable instructions on contributory negligence. See Instruction Nos. 6.000, 6.040, 6.050 and 6.060.

Although the passenger's opportunity to observe the danger may have been co-extensive with the driver's, his duty to observe is not. *Major, 209 Va. at 199, 163 S.E.2d at 168–69*; *Diggs, 201 Va. at 875, 114 S.E.2d at 747.*

The danger, if apparent to the passenger, must exist for a sufficient length of time to enable him to give timely warning. *Atlantic Coast Line R.R. v. Withers, 192 Va. 493, 509, 65 S.E.2d 654, 662 (1951).*

☞ ***PRACTICE POINTER:*** For an instruction on a passenger's duty to warn at railroad crossings, see Instruction No. 18.030, Passenger's Duty to Look and Listen.

### *ALERTS:*

- When a passenger was so situated that she could not warn the driver, because she was seated in the rear seat of a vehicle and unable to see vehicles on the road ahead, she is not negligent as a matter of law. *Diggs, 201 Va. at 876, 114 S.E.2d at 747.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

MICHIE'S JURISPRUDENCE, Automobiles § 39

## Instruction No. 13.010
## Passenger's Duty When Getting Out of Vehicle

**A passenger getting out of a motor vehicle has a duty to use ordinary care for his own safety.**

**If a passenger fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Dewhirst, 240 Va. 266, 269, 396 S.E.2d 840, 843 (1990)*; *Finck v. Brock, 202 Va. 948, 951, 121 S.E.2d 373, 375 (1961)*; *Jamison v. Richardson, 198 Va. 190, 193–95, 93 S.E.2d 140, 143–44 (1956)*; *National Cab Co. v. Bagby, 196 Va. 703, 705–07, 85 S.E.2d 270, 272–73 (1955)*; *Eggleston v. Broadway-Manhattan Taxicab Corp., 194 Va. 584, 587–88, 74 S.E.2d 212, 214–15 (1953)*.

### PRACTICE COMMENTARY

This instruction states the common law duty of care. "[O]ne who elects to alight from the street side must exercise care commensurate with the dangers and hazards that may be incident to such an undertaking." *Eggleston, 194 Va. at 588, 74 S.E.2d at 214*.

☞ ***PRACTICE POINTER:*** This instruction is almost always used as a contributory negligence instruction. See Chapter 6, Contributory Negligence and Assumption of the Risk.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

MICHIE'S JURISPRUDENCE, Automobiles § 70

# Chapter 14

# MOTOR VEHICLES—PEDESTRIANS

## Scope Note


| | |
|---|---|
| **Instruction No. 14.000** | **General Duties of Pedestrian** |
| **Instruction No. 14.010** | **Pedestrian's Duties to Use Sidewalk or Shoulder, or Walk Along Edge of Roadway** |
| **Instruction No. 14.020** | **Pedestrian's Duty Not to Step Into Highway or Street From Behind an Obstruction** |
| **Instruction No. 14.030** | **Pedestrian's Right-of-Way at Marked Crosswalk, Regular Crossing, or at Intersection Where Speed Limit is Not More Than 35 m.p.h.** |
| **Instruction No. 14.040** | **Pedestrian's Duty When Crossing Highway or Street Between Intersections** |
| **Instruction No. 14.050** | **Walk—Don't Walk Signals** |

# SCOPE NOTE

Instruction No. 14.000 covers the general duties of a pedestrian: to use ordinary care, to keep a lookout for motor vehicles, not to cross a highway or street unless it is safe, and to change course to avoid vehicles. The next instructions, Nos. 14.010, 14.020, 14.040 and 14.050, cover the principal statutory duties: to use an available sidewalk, not to step into a highway or street from behind an obstruction, to cross a highway or street by the most direct route, and not to cross against a "Don't Walk" sign. One or more of the general duties may apply even if a statutory duty applies. When both general and statutory duties are involved, they can be combined into the same instruction.

In addition to the duties that apply to a pedestrian, Instruction No. 14.030 defines the pedestrian's right-of-way and the duty of a driver when the pedestrian has the right-of-way.

Va. Code Ann. § 46.2-100 sets out definitions for the following terms that are used in the instructions appearing in this chapter: crosswalk, highway, intersection, lane, roadway, safety zone, shoulder, sidewalk, traffic control device, traffic lane, and vehicle.

In particular, this statute defines "highway" broadly, as "the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, *including the streets and alleys*" (emphasis added), and also includes additional areas that come within the ambit of the term "highway" specifically for law enforcement purposes. Similarly, "roadway" is broadly defined as being "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder." So, as a matter of statute, "highway" and "roadway" includes a "street." Because the aim of the model instructions is to make them clear to jurors, and to eliminate legal technicalities in the instruction language wherever that can reasonably be done, the phrase "highway or street" appears in the instructions throughout this chapter, and "roadway" is used to describe both highways and streets. Only the term that applies in the specific facts of the case at hand should be used when an instruction is being given.

## Instruction No. 14.000
## General Duties of Pedestrian

**A pedestrian has a duty to use ordinary care when he is** [walking on; crossing; walking along, but off of] **the** [hard surface; traveled portion] **of a highway or street:**

**(1) to keep a lookout for motor vehicles;**

**(2) to refrain from entering or crossing** [an intersection; the hard surface of a highway or street; the traveled portion of a highway or street] **in disregard of traffic approaching in such a manner that a reasonable person would not attempt to enter or cross; and**

**(3) to step from his** [course; intended path of travel] **into a place of safety if it reasonably appears to him that he is in danger of being struck by a motor vehicle.**

**If a pedestrian fails to perform any one or more of these duties, then he is negligent.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 46.2-923, 46.2-924.

**Case Authority:** *Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672, 679–81, 643 S.E.2d 156, 160–61 (2007); Russ v. Destival, 267 Va. 458, 462–63, 593 S.E.2d 201, 203 (2004)*; *Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993)*; *Cofield v. Nuckles, 239 Va. 186, 190, 387 S.E.2d 493, 495 (1990)*; *Kay Mgmt. Co. v. Creason, 220 Va. 820, 832, 263 S.E.2d 394, 402 (1980)*; *Straughan v. Nash, 215 Va. 627, 632, 212 S.E.2d 280, 283 (1975)*; *Hopson v. Goolsby, 196 Va. 832, 837–39, 86 S.E.2d 149, 152–53 (1955).*

### Practice Commentary

This instruction was approved by the Supreme Court in *Cofield, 239 Va. at 191, 387 S.E.2d at 496*. The Court has held "that a motorist or pedestrian has no right-of-way over the other except as provided by statute." *Schutt v. Brockwell, 214 Va. 38, 42, 196 S.E.2d 921, 925 (1973).*

Use only the alternatives that are supported by evidence. When the pedestrian is crossing at a marked crosswalk, Instruction No. 14.030 should be used. For application of general duties of a pedestrian walking across the driving area of a private street and parking lot maintained by an apartment complex, see *Kay Mgmt., 220 Va. at 829–30, 263 S.E.2d at 400.*

Although the issue of contributory negligence is ordinarily a question for the jury, a pedestrian can be contributorily negligent as a matter of law under sufficient circumstances. See, e.g., *Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993)* (where several pedestrians saw oncoming traffic but plaintiff walked into the side of a moving vehicle, she was guilty of contributory negligence as a matter of law).

In order for a pedestrian involved in a rescue on or near a highway to be found negligent, the actions of the pedestrian must reach the level of rash and reckless disregard for personal safety which is a question for the jury to decide. *Kimble v. Carey, 279 Va. 652, 663, 691 S.E.2d 790, 796 (2010).*

☞ ***Practice Pointer:*** Va. Code Ann. § 46.2-904 provides some limitations on persons riding bicycles but also provides, in part, that "[a] person riding a bicycle, electric personal assistive mobility device, motorized skateboard or foot-scooter, motor-driven cycle, or an electric power-assisted bicycle on a sidewalk, shared-use path, or across a roadway on a crosswalk, shall have all the rights and duties of a pedestrian under the same circumstances." See also *Russ, 267 Va. at 462–63, 593 S.E.2d at 203*. Va. Code Ann. § 46.2-100 provides definitions of the devices listed.

### *ALERTS:*

- A police officer, while on foot pursuing a suspect, is in a different category from an ordinary pedestrian. The degree of concern he should give to his own safety necessarily varies with the amount of attention he must devote to the official task at hand. *Doe v. Scott, 221 Va. 997, 1000–01, 277 S.E.2d 159, 161 (1981).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railraods §§ 21 through 29; Streets and Highways §§ 85, 130, 145

## Instruction No. 14.010
## Pedestrian's Duties to Use Sidewalk or Shoulder, or Walk Along Edge of Roadway

**If there is a reasonably suitable and passable sidewalk, a pedestrian has a duty to use the sidewalk.**

**If there is no such sidewalk, a pedestrian may walk on the** [hard surface; main traveled portion] **of the roadway, but he has a duty to keep to the extreme left side or edge, except that where the shoulders of the highway or street are of sufficient width to permit, the pedestrian may walk on either shoulder.**

**If a pedestrian fails to perform such duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-928.

**CASE AUTHORITY:** *Clohessy v. Weiler, 250 Va. 249, 251, 462 S.E.2d 94, 96 (1995)*; *Whitfield v. Dunn, 202 Va. 472, 475, 117 S.E.2d 710, 713 (1961).*

### PRACTICE COMMENTARY

Where pedestrian and driver both have a right under Va. Code Ann. § 46.2-928 to be upon a portion of the hard surface, each must exercise his right with due regard for the other. Neither has a right-of-way over the other, except as a statute may expressly provide. *South Hill Motor Co. v. Gordon, 172 Va. 193, 203–04, 200 S.E. 637, 642 (1939).* See also *Schutt v. Brockwell, 214 Va. 38, 42, 196 S.E.2d 921, 925 (1973)* ("reaffirm[ing] . . . that a motorist or a pedestrian has no right-of-way over the other except by statute"). Instruction No. 14.000 (General Duties of a Pedestrian) may also be appropriate.

### *ALERTS:*

- A man on foot trying to remove an animal from a public highway is not a pedestrian. *Virginia Farm Bureau Mut. Ins. Co. v. Simpkins, 217 Va. 611, 614–15, 231 S.E.2d 226, 229 (1977)*; *Bayne v. Tharpe, 201 Va. 484, 488–89, 111 S.E.2d 816, 819 (1960).*

- A workman whose duties require him to work on that part of a highway used by passing cars is not required to exercise the same care and keep the same lookout for cars as an ordinary pedestrian. But such a workman must nevertheless use ordinary care, that is, such care as a reasonably prudent person under the same or similar circumstances would use for his safety. *White v. Sands, 197 Va. 617, 621, 90 S.E.2d 835, 838 (1956).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railroads §§ 21 through 29; Streets and Highways §§ 85, 130, 145

## Instruction No. 14.020
## Pedestrian's Duty Not to Step Into Highway or Street From Behind an Obstruction

**A pedestrian has a duty not to step into a highway or street at any point between intersections where he would be obscured from the vision of a driver of an approaching vehicle by** [another vehicle; any obstruction] [along the curb; on the side of the road]**.**

**If a pedestrian fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-926.

**CASE AUTHORITY:** *Cofield v. Nuckles, 239 Va. 186, 189–90, 387 S.E.2d 493, 495 (1990).*

### PRACTICE COMMENTARY

This instruction applies only when the pedestrian steps into that portion of the street open to moving vehicular traffic. "[A] motorist or pedestrian . . . has no right-of-way over the other except as provided by statute." *Schutt v. Brockwell, 214 Va. 38, 42, 196 S.E.2d 921, 925 (1973).* Thus, the instruction does not apply to a pedestrian who steps into the street to board a bus or to enter a safety zone, provided the pedestrian crosses the highway at a right angle. See Va. Code Ann. § 46.2-926.

☞ ***PRACTICE POINTER:*** Where this instruction is used, Instruction No. 14.000 may be appropriate also.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railroads §§ 21 through 29; Streets and Highways §§ 85, 130, 145

## Instruction No. 14.030
## Pedestrian's Right-of-Way at Marked Crosswalk, Regular Crossing, or at Intersection Where Speed Limit is Not More Than 35 m.p.h.

**A pedestrian has the right-of-way when crossing a highway or street** [within any clearly marked crosswalk; at any regular pedestrian crossing at the end of a block; by the most direct route at any intersection where the maximum speed limit is not more than 35 miles per hour].

**The pedestrian's right-of-way begins on one side of the roadway and continues until he has completed his crossing** [in the crosswalk; regular pedestrian crossing; at the intersection].

**When a pedestrian has the right-of-way, the driver of a vehicle has a duty to change course, or slow down, or come to a complete stop, if necessary, to permit the pedestrian to cross safely and expeditiously.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-924.

**CASE AUTHORITY:** *Basilotta v. Barker, 222 Va. 683, 685–86, 283 S.E.2d 220, 221 (1981)*; *Phillips v. Stewart, 207 Va. 214, 217–18, 148 S.E.2d 784, 787 (1966)*; *Lucas v. Craft, 161 Va. 228, 234–35, 170 S.E. 836, 838 (1933).*

### PRACTICE COMMENTARY

The driver may have additional duties, as well as those expressed in Instruction No. 10.000, Look Out; Control; Speed. If so, those additional duties may be added to this instruction or may be the subject of a separate instruction.

The statute applies to highways in rural areas as well as to city streets. *Nelson v. Dayton, 184 Va. 754, 763, 36 S.E.2d 535, 539 (1946).*

The duty does not apply at private crossings. *Hendricks v. Virginia Elec. & Power Co., 161 Va. 793, 797, 172 S.E. 160, 161 (1934).* But see *Kay Mgmt. Co. v. Creason, 220 Va. 820, 829–32, 263 S.E.2d 394, 400–02 (1980)* (public accessibility to streets of an apartment complex creates a presumption that the streets are highways); *Reese v. Snelson, 192 Va. 479, 487, 65 S.E.2d 547, 552 (1951)* (sidewalk on private property but extension of lateral boundaries into street held a crossing).

There is no particular definition of "clearly marked." *Phillips, 207 Va. at 218, 148 S.E.2d at 787.*

☞ ***PRACTICE POINTER:*** See also *Sawyer v. Blankenship, 160 Va. 651, 657, 169 S.E. 551, 553 (1933)* (jury question whether pedestrian properly crossed at intersection with no visible markings).

### *ALERTS:*

- This instruction specifies when pedestrians have the right-of-way. For the duties of pedestrians at a crossing or intersection, see Instruction No. 14.000, General Duties of Pedestrian.

- When a vehicle is stopped at a clearly marked crosswalk, a regular pedestrian crosswalk at the end of a block, or at any intersection where the speed limit is not more than 35 miles per hour, the driver of any other vehicle approaching from an adjacent lane or from behind the stopped vehicle shall not overtake and pass the stopped vehicle. Va. Code Ann. § 46.2-924(B).

- This instruction should not be used in a case where traffic is controlled by a law enforcement officer or traffic control device. See Va. Code Ann. § 46.2-924(C); *Floyd v. Nunn, 217 Va. 834, 838–39, 232 S.E.2d 813, 816–17 (1977).*

- A pedestrian has the right-of-way when he is proceeding with a traffic light, pedestrian control signal, or traffic direction in his favor. Va. Code Ann. §§ 46.2-833, 46.2-924, 46.2-925; *Arney v. Bogstad, 199 Va. 460, 463–64, 100 S.E.2d 749, 752–53 (1957).* The pedestrian does not have the right-of-way if he enters the street on a red light. *Floyd, 217 Va. at 836–40, 232 S.E.2d at 815–17*;

*Sanders v. Newsome, 179 Va. 582, 595, 19 S.E.2d 883, 888 (1942).* When applicable, this instruction should be modified to cover those situations.

• Pedestrians crossing highways at intersections have the right-of-way over vehicles making turns onto those highways being crossed by the pedestrians. Va. Code Ann. § 46.2-924(C). The statute also empowers "Arlington County, Fairfax County, Loudoun County and any town therein, the City of Alexandria, the City of Fairfax, and the City of Falls Church" to provide by ordinance for the installation and maintenance of signs at crosswalks requiring drivers to yield to pedestrians crossing or attempting to cross a highway and for penalties for violations. Va. Code Ann. § 46.2-924(C).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railraods §§ 21 through 29; Streets and Highways §§ 85, 130, 145

## Instruction No. 14.040

### Pedestrian's Duty When Crossing Highway or Street Between Intersections

**A pedestrian crossing a highway or street has a duty to cross by the most direct route and a duty to use ordinary care in crossing.**

**If a pedestrian fails to perform either or both of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-923.

**CASE AUTHORITY:** *Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993)*; *Cofield v. Nuckles, 239 Va. 186, 189, 387 S.E.2d 493, 495 (1990)*; *Straughan v. Nash, 215 Va. 627, 632, 212 S.E.2d 280, 283 (1975)*; *Schutt v. Brockwell, 214 Va. 38, 40–41, 196 S.E.2d 921, 924 (1973).*

### PRACTICE COMMENTARY

While crossing between intersections requires greater vigilance than crossing at an intersection, the question for the jury remains whether the pedestrian exercised ordinary care under all the circumstances. See *Von Lubowiecki v. Donnell, 235 Va. 131, 134, 366 S.E.2d 90, 92 (1988)*; *Schutt, 214 Va. at 40, 196 S.E.2d at 924.*

### *ALERTS:*

- This instruction should not be given where the pedestrian is crossing at a marked crosswalk, at any regular pedestrian crossing at the end of a block, or where the speed limit is 35 miles per hour or less, or when a statute provides a right-of-way. It is applicable where the pedestrian is crossing between intersections.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railroads §§ 21 through 29; Streets and Highways §§ 85, 130, 145

## Instruction No. 14.050
## Walk—Don't Walk Signals

**A pedestrian has a duty not to start to cross a highway or street in the direction of a "Don't Walk" signal, and a duty, if he partially completed crossing on a "Walk" signal, to proceed to a** [sidewalk; safety island] **while the "Don't Walk" signal is showing.**

**If a pedestrian fails to perform either duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-925.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

If the pedestrian begins his crossing on a "Walk" signal and the signal changes to "Don't Walk" before he has completed crossing, the pedestrian may proceed until he reaches "a sidewalk or [a] safety island." Va. Code Ann. § 46.2-925.

☞ ***PRACTICE POINTER:*** "Safety island" is not defined in either the statute specifically dealing with "Walk" and "Don't Walk" signals (Va. Code Ann. § 46.2-925) or the general definitions provision for title 46.2 (Va. Code Ann. § 46.2-100). "Safety zone" is defined in Va. Code Ann. § 46.2-100, but the relationship between "safety island" and "safety zone," if any, is unclear. For a statement, in another context, that the center of a street is not a comparative zone of safety, see *Smith v. Spradlin, 204 Va. 509, 511–12, 132 S.E.2d 455, 457 (1963).*

According to Va. Code Ann. § 46.2-925, "[w]henever pedestrian control signals exhibiting the words, numbers, or symbols meaning 'Walk' or 'Don't Walk' are in place such signals shall indicate and apply to pedestrians." See Va. Code Ann. § 46.2-925 for further discussion of how pedestrians should react to the "Walk" and "Don't Walk" signals.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 21.5, 21.14

Kent Sinclair, VIRGINIA REMEDIES §§ 1-4, 27-2, 27-6

MICHIE'S JURISPRUDENCE, Automobiles §§ 29 through 36, 67, 110; Negligence § 25; Street Railroads §§ 21 through 29; Streets and Highways §§ 85, 130, 145

# Chapter 15

# MOTOR VEHICLES—INTOXICATED DRIVERS

**Scope Note**


**Instruction No. 15.000** **Driving Under the Influence of Intoxicants**

**Instruction No. 15.005** **Punitive Damages: Intoxicated Driver**

**Instruction No. 15.010** **Contributory Negligence: Riding With Intoxicated Driver**

**Instruction No. 15.020** **Assumption of the Risk: Riding With Intoxicated Driver**

# SCOPE NOTE

These instructions cover the law involving intoxicated drivers. The first instruction, No. 15.000, defines driving under the influence of intoxicants. Even though driving under the influence of intoxicants is negligence, that negligence must be a proximate cause of the accident in order to establish liability. *Bogstad v. Hope, 199 Va. 453, 458–59, 100 S.E.2d 745, 748–49 (1957).*

Instruction No. 15.005 is a finding instruction based on Va. Code Ann. § 8.01-44.5, stating the conditions under which punitive damages may be awarded.

The focus of Instruction Nos. 15.010 and 15.020 is on the passenger who rides with an intoxicated driver. Instruction No. 15.010 addresses contributory negligence, and Instruction No. 15.020 covers assumption of the risk. See also Chapter 6, Contributory Negligence and Assumption of Risk, and Chapter 13, Motor Vehicles—Passengers.

The instructions in this chapter are drafted based on the driver operating a motor vehicle. If a driver is operating an engine or a train instead, the instructions will need to be modified to include those alternatives.

## Instruction No. 15.000
## Driving Under the Influence of Intoxicants

**A person is under the influence of intoxicants if it is apparent that he has consumed enough** [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to affect his manner, disposition, speech, muscular movement, general appearance, or behavior.**

**If a person drives a motor vehicle while under the influence of intoxicants, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 4.1-100, 18.2-266.

**CASE AUTHORITY:** *Harrell v. Woodson, 233 Va. 117, 122–23, 353 S.E.2d 770, 773–74 (1987)*; *Baker v. Taylor, 229 Va. 66, 69, 326 S.E.2d 669, 671 (1985)*; *Virginia & Md. R.R. Co. v. White, 228 Va. 140, 146, 319 S.E.2d 755, 759 (1984)*; *Oliphant v. Snyder, 206 Va. 932, 934–35, 147 S.E.2d 122, 124–25 (1966)*; *Baker v. Marcus, 201 Va. 905, 910, 114 S.E.2d 617, 621 (1960)*; *Bates v. Thompson, 200 Va. 501, 505, 106 S.E.2d 728, 731 (1959)*; *Bogstad v. Hope, 199 Va. 453, 458–59, 100 S.E.2d 745, 748–49 (1957)*.

## PRACTICE COMMENTARY

The language of the instruction is taken from the definition of "intoxicated" found in Va. Code Ann. § 4.1-100. In *Rodgers v. Commonwealth, 197 Va. 527, 532, 90 S.E.2d 257, 260 (1955)*, the Court stated that "[a]n instruction in the language of this statute would be correct and sufficient on [this] point." For an instruction on punitive damages, see Instruction No. 15.005, Punitive Damages: Intoxicated Driver.

## *ALERTS:*

- This instruction should not be given if the only evidence offered to prove intoxication is the odor of alcohol on the defendant's breath. *Hill v. Lee, 209 Va. 569, 572, 166 S.E.2d 274, 276 (1969)*. In fact, when evidence offered to prove intoxication indicates nothing more than the "mere odor" of alcohol, such evidence must be excluded. *Hemming, 221 Va. at 1146, 277 S.E.2d at 232*; see also *Hoffner v. Kreh, 227 Va. 48, 52, 313 S.E.2d 656, 658 (1984)*. The issue of intoxication is properly admitted, however, when there are other circumstances present, e.g., evidence that the person's "manner, disposition, speech, muscular movement, general appearance or behavior" is affected. *Hemming, 221 Va. at 1146, 277 S.E.2d at 232*; *Hill, 209 Va. at 572, 166 S.E.2d at 276*.

- Evidence of alcohol consumption and intoxication is admissible where "the quantity of alcohol consumed and the relative time of its consumption are sufficient to raise an inference of intoxication." See *Harrell, 233 Va. at 123, 353 S.E.2d at 774*; *Baker, 229 Va. at 69–70, 326 S.E.2d at 671*. Such evidence may also be admissible even if the quantity of alcohol is not sufficient to establish intoxication in the strict legal sense, but is enough to affect a person's ability to perceive danger with clarity, to make decisions with prudence, or to operate a motor vehicle with the skill and caution required by law. *Id.* In *Hodnett v. Friend, 232 Va. 447s, 452, 352 S.E.2d 338, 341 (1987)*, the issue of intoxication as it affected driving ability was properly submitted to the jury upon proof of a .20 percent by weight by volume concentration of alcohol in the defendant's blood and expert testimony as to its effect, although the plaintiff observed no unusual behavior.

- Any significant departure in an instruction from the statutory definition of intoxication may be error. See, e.g., *Rodgers, 197 Va. at 531–32, 90 S.E.2d at 260*; *Gardner v. Commonwealth, 195 Va. 945, 952–55, 81 S.E.2d 614, 619 (1954)*.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 3.5, 13.5, 21.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES § 3-4

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 118

## Instruction No. 15.005
## Punitive Damages: Intoxicated Driver

**If you find your verdict for the plaintiff and if you further find by the greater weight of the evidence that:**

Blood/Breath test

**(1) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume (0.15 grams or more per 210 liters of breath); and**

**(2) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle would be impaired, or when he was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and**

**(3) the defendant's intoxication was a proximate cause of the** [injury; death] **of the plaintiff**;

Unreasonable refusal

**(1) when the incident causing injury or death occurred, the defendant was intoxicated and unreasonably refused to submit to a test of his blood alcohol content; and**

**(2) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle was impaired;**

**then you may award punitive damages. If you do so, you must state separately the amount allowed as punitive damages.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-44.5.

**Principal Case Authority:** *Cain v. Lee, 290 Va. 129, 133–38, 772 S.E.2d 894, 896–98 (2015)*; *Doe v. Isaacs, 265 Va. 531, 536–39, 579 S.E.2d 174, 177–79 (2003)*; *Allstate Ins. Co. v. Wade, 265 Va. 383, 396, 579 S.E.2d 180, 187 (2003).*

**Other Relevant Decisions: Cases decided prior to enactment of statute—** *Woods v. Mendez, 265 Va. 68, 75, 574 S.E.2d 263, 267 (2003); Webb v. Rivers, 256 Va. 460, 463, 507 S.E.2d 360, 362 (1998)*; *Huffman v. Love, 245 Va. 311, 314, 427 S.E.2d 357, 360 (1993)*; *Puent v. Dickens, 245 Va. 217, 219–20, 427 S.E.2d 340, 342 (1993)*; *Hack v. Nester, 241 Va. 499, 506–07, 404 S.E.2d 42, 45 (1990).*

## Practice Commentary

***Limits on recovery.*** Driving while intoxicated does not, in itself, allow recovery of punitive damages. *Woods, 265 Va. at 77, 574 S.E.2d at 268.* Actual malice or willful disregard for others must be proved. Intoxication may serve to elevate defendant's conduct to a level of negligence so gross, wanton and culpable as to show reckless disregard for human life. *Huffman, 245 Va. at 314–15, 427 S.E.2d at 360*; *Puent, 245 Va. at 219, 427 S.E.2d at 342*; *Booth, 236 Va. at 273, 374 S.E.2d at 3.*

*Consider however*, that in 2017, the General Assembly amended Va. Code Ann. § 8.01-44.5 to include a rebuttable presumption of recklessness for defendants who consume alcohol and then operate a motor vehicle, engine, or train. The presumption applies to the second paragraph of both alternative instructions. The presumption also may impact/undermine the rule from *Woods*. If the person ingests an intoxicating substance voluntarily, then the mere act of driving is enough to trigger the presumption. Only if the ingestion was involuntary does this limit seem relevant.

***Erroneous instructions.*** In *Cain*, the Supreme Court held that it was error to instruct the jury that punitive damages under Va. Code Ann. § 8.01-44.5 were disfavored because the General Assembly has specifically provided for punitive damages upon proof of the statutory criteria. *Cain, 290 Va. at 135, 772 S.E.2d at 897.* In addition, the instruction provided in *Cain* was faulty because it contained the requirement that the defendant's conduct must be "egregious," an additional element not included in the statute. *Id. at 135, 772 S.E.2d at 896–97.*

***Post-accident conduct.*** Post-accident conduct is admissible pursuant to Va. Code Ann. § 8.01-44.5, which states: "Evidence of similar conduct by the same defendant subsequent to the date of the personal injury or death . . . shall be admissible at trial for consideration by the jury or other finder of fact for the limited purpose of determining what amount of punitive damages may be appropriate to deter the defendant and others from similar future action." Va. Code Ann. § 8.01-44.5 was amended to reverse the holding in *Cain*, which excluded evidence of a defendant's subsequent DUI conviction and his dismissal from the Virginia Alcohol Safety Awareness Program. *Cain, 290 Va. at 137, 772 S.E.2d at 897–98.*

☞ ***PRACTICE POINTER:*** When the defendant has unreasonably refused to submit to a blood-alcohol test, use that alternative for the first and second numbered paragraphs of this instruction. The unreasonable-refusal-alternative is not available where the defendant was operating a train or an engine because the implied-consent statute only applies to one who "operates a motor vehicle upon a highway." Va. Code Ann. § 18.2-268.2. As a result, this alternative omits the disjunctive clause found in the blood-test instruction. See Va. Code Ann. § 8.01-44.5.

***ALERTS:***

- This Instruction embodies statutory grounds for imposing punitive damages. The statutory basis for punitive damages, however, does not preclude the fact finder from awarding, under common-law principles, "exemplary damages to the plaintiff if the evidence proves that the defendant acted with malice toward the plaintiff or the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others." *Webb, 256 Va. at 462–63, 507 S.E.2d at 362*; Va. Code Ann. § 8.01-44.5. *Webb* discusses the difference between common-law and statutory punitive damages. *256 Va. at 463, 507 S.E.2d at 362*. See also Instruction Nos. 9.080, General Punitive Damages and 9.090, Punitive Damages: Definition of Common Law Malice.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 3.5, 13.5, 21.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES § 3-4

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 118

## Instruction No. 15.010
## Contributory Negligence: Riding With Intoxicated Driver

**If, at the time the plaintiff** [voluntarily entered the vehicle; continued as a passenger after he had a reasonable opportunity to leave], **he knew, or should have known, that the defendant had consumed enough** [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to impair, or to be likely to impair, his ability to drive, then the plaintiff was negligent** [unless there were circumstances that would make his conduct reasonable]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: None.

**CASE AUTHORITY**: *Rice v. Charles, 260 Va. 157, 166–67, 532 S.E.2d 318, 323–24 (2000)*; *Budzinski v. Harris, 213 Va. 107, 109–12, 189 S.E.2d 372, 375–77 (1972)*; *Wright v. Tate, 208 Va. 291, 295–96, 156 S.E.2d 562, 565 (1967)*; *Meade v. Meade, 206 Va. 823, 827, 147 S.E.2d 171, 174 (1966)*; *Yorke v. Maynard, 173 Va. 183, 188, 3 S.E.2d 366, 369 (1939).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 5.1

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.04, 25.02, 25.05, 26.05

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.5, 2.12, 9.2

Kent Sinclair, VIRGINIA REMEDIES § 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 118

## Instruction No. 15.020
## Assumption of the Risk: Riding With Intoxicated Driver

**If, at the time the plaintiff** [voluntarily entered the vehicle; continued as a passenger after he had a reasonable opportunity to leave], **he knew that the defendant had consumed enough** [alcoholic beverages; drugs; alcoholic beverages and drugs in combination] **to impair, or to be likely to impair his ability to drive, and if the plaintiff fully appreciated the nature and extent of the risk in** [entering the vehicle; continuing as a passenger after he had a reasonable opportunity to leave]**, then the plaintiff assumed the risk of any injury resulting from the defendant's intoxication** [unless there were circumstances that would make his conduct reasonable]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: None.

**CASE AUTHORITY**: *Young v. Lambert, 253 Va. 237, 241, 482 S.E.2d 823, 826 (1997)*; *Budzinski v. Harris, 213 Va. 107, 110, 189 S.E.2d 372, 375 (1972)*; *Leslie v. Nitz, 212 Va. 480, 483–84, 184 S.E.2d 755, 757–58 (1971)*; *Arrington v. Graham, 203 Va. 310, 314–15, 124 S.E.2d 199, 202 (1962)*.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Kent Sinclair, VIRGINIA REMEDIES §§ 25-4; 25-5

MICHIE'S JURISPRUDENCE, Automobiles §§ 12 through 118

# Chapter 16

# MOTOR VEHICLES—UNINSURED MOTORISTS

**Scope Note**

**Instruction No. 16.000 Issues**

**Instruction No. 16.010 Finding Instruction**

# SCOPE NOTE

There are three typical types of uninsured motorist cases. In the first type, the plaintiff, who has uninsured motorist coverage, is injured by a driver whose identity is known but who is uninsured. In that case, a suit against the named defendant is defended by the plaintiff's insurance company. To the jury, that action is indistinguishable from an ordinary automobile negligence case; therefore, the jury instructions are indistinguishable from those used in an ordinary negligence case.

The second type is a hit-and-run accident. The plaintiff is injured when struck by a car. It is admitted that a car was involved, but the identity of the driver is unknown. The plaintiff sues "John Doe," who is defended by the plaintiff's insurer, which can appear in its own name or in the name of the defendant. Va. Code Ann. § 38.2-2206(E). The jury may be instructed:

**This lawsuit is brought against John Doe because the true identity of the defendant is unknown. In considering the evidence and the instructions in this case, you should decide the case as if John Doe was a known person.**

In all other respects, the instructions are like those in a typical negligence case. Sometimes the insurance company refuses to admit that the defendant is unknown as, for example, when it believes that the plaintiff is concealing the identity of the true defendant. In that case, you should use Instruction Nos. 16.000 and 16.010, except that you should delete references to the plaintiff having to prove the existence of the vehicle. Plaintiff still must prove that the driver was unknown.

In the third type of case, the plaintiff claims that he was injured by a driver who is unknown and who made no actual contact. For example, the plaintiff may claim another driver forced him off the road. When the defending insurance company disputes whether there was another driver, you should use Instruction Nos. 16.000 and 16.010, and the jury may also be given the instruction suggested above on how to treat "John Doe."

Instruction Nos. 16.000 and 16.010 are adapted directly from Instruction Nos. 3.000, Negligence: Issues and Allocations of Burdens of Proof and 3.050, Finding Instruction, by adding the additional issue present in a John Doe case that does not appear in a standard automobile negligence case. In all other respects, the instructions in a John Doe case are indistinguishable from a standard automobile negligence case.

Although an insurance company has a right to defend a John Doe case, it cannot be sued directly on its uninsured motorist endorsement until judgment has been entered against the uninsured or unknown defendant unless its contract with the insured allows a direct suit. *General Accident, Fire & Life Assurance Corp. v. Aetna Cas. & Sur. Co., 208 Va. 467, 473, 158 S.E.2d 750, 754 (1968)*; but see *Willard v. Aetna Cas. & Sur. Co., 213 Va. 481, 482–83, 193 S.E.2d 776, 778 (1973)* (resident of North Carolina who obtained a policy in North Carolina but who was injured in Virginia could sue insurer directly based on the law of North Carolina where the contract allowed such a suit).

For cases addressing an uninsured motorist carrier's liability when an insured has been charged with negligent entrustment even after that carrier has paid its policy limits settling the claim against the driver, see *Johnson v. Windsor Ins. Co., 268 Va. 196, 200, 597 S.E.2d 31, 34 (2004)*; *Haislip v. Southern Heritage Ins. Co., 254 Va. 265, 269, 492*

*S.E.2d 135, 137 (1997)* (interpreting Va. Code Ann. § 38.2-2204). A declaratory-judgment action may be used to determine the insurer's duties.

If it is necessary to sue an insurance company to satisfy a judgment in an uninsured-motorist case, that action is one in contract; for breach of the contract or for performance of the contract, see Chapter 45, Contracts.

**Instruction No. 16.000**
**Issues**

**Your verdict must be based upon the facts as you find them and on the law contained in these instructions.**

**The issues in this case are:**

(1) **Was a vehicle involved in the accident whose driver was** [unknown; identified but who did not have insurance coverage in effect at the time of the accident]**?**

(2) **If so, was the driver of that vehicle negligent?**

(3) **If the driver was negligent, was his negligence a proximate cause of the accident?**

(4) **If the plaintiff is entitled to recover, what is the amount of his damages?**

**On these issues the plaintiff has the burden of proof.**

**Your decision on these issues must be governed by the instructions which follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 38.2-2206.

**CASE AUTHORITY:** *Haymore v. Brizendine, 210 Va. 578, 582, 172 S.E.2d 774, 777–78 (1970); Doe v. Simmers, 207 Va. 956, 957, 154 S.E.2d 146, 147 (1967).*

### PRACTICE COMMENTARY

The governing statute, Va. Code Ann. § 38.2-2206(B), provides that a motor vehicle is deemed uninsured if the driver is unknown. Regarding the definition of "unknown" as it is used in the statute, the Supreme Court of Virginia has explained: "There is no limitation in the statute on the commonly accepted meaning of the word 'unknown.' For us to say that an insured had the duty to exercise due diligence to ascertain the identity of an unknown motorist would be reading into the statute language which does not there appear." *Mangus v. Doe, 203 Va. 518, 520, 125 S.E.2d 166, 168 (1962).*

### *ALERTS:*

- When contributory negligence is an issue, the instruction should be modified by striking subparagraph (4) above and adding after subparagraph (3) as follows:

**On these issues the plaintiff has the burden of proof.**

**(4) Was the plaintiff negligent?**

**(5) If the plaintiff was negligent, was his negligence a proximate cause of the accident?**

**On these issues the defendant has the burden of proof.**

**(6) If the plaintiff is entitled to recover, what is the amount of his damage?**

**On this issue the plaintiff has the burden of proof.**

**Your decision on these issues must be governed by the instructions which follow.**

The main or modified instruction should be used with appropriate instructions on standard of proof, negligence, contributory negligence (if in issue), proximate cause, and damages.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21: Motor Vehicle Injuries

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

MICHIE'S JURISPRUDENCE, Automobiles §§ 47 through 117; Insurance §§ 120 through 165

**Instruction No. 16.010**
**Finding Instruction**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence**:

(1) **that there was a vehicle involved in the accident whose driver was** [unknown; identified but who did not have insurance coverage in effect at the time of the accident]**; and**

(2) **that the driver of that vehicle was negligent; and**

(3) **that** [this driver's; the defendant's] **negligence was a proximate cause of the plaintiff's accident and damages.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. § 38.2-2206.

**CASE AUTHORITY**: *Haymore v. Brizendine, 210 Va. 578, 582, 172 S.E.2d 774, 777–78 (1970)*; *Doe v. Simmers, 207 Va. 956, 957, 154 S.E.2d 146, 147 (1967).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- When contributory negligence is an issue, the instruction should be modified by adding a comma to follow "above" at the end of the last paragraph of the instruction, and then inserting the following afterward:

> **or if the defendant proved by the greater weight of the evidence that the plaintiff was negligent and that his negligence was a proximate cause of the accident.** See also Instruction No. 3.050, Finding Instruction.

If some other affirmative defense is available, alter this instruction and Instruction No. 16.000 to reflect such defense.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 21: Motor Vehicle Injuries

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.12

MICHIE'S JURISPRUDENCE Automobiles §§ 47 through 117; Insurance §§ 120 through 165

# Chapter 17

# MOTOR VEHICLES—EQUIPMENT



## Scope Note

**Instruction No. 17.000** **Headlights: Requirements**
**Instruction No. 17.010** **Tail Lights: Requirements**
**Instruction No. 17.020** **Brake Lights: Requirements**
**Instruction No. 17.030** **Horn: Requirements**
**Instruction No. 17.040** **Brakes: Requirements**
**Instruction No. 17.050** **Mirrors: Requirements**
**Instruction No. 17.060** **Windshield Wipers: Requirements**
**Instruction No. 17.070** **Flag or Light at the End of Load**
**Instruction No. 17.080** **Projection of Load**
**Instruction No. 17.090** **Airbags**

# SCOPE NOTE

The following instructions deal with the proper equipment for vehicles operated on the highways of Virginia. It should be noted that "a moped shall be a motorcycle when operated at speeds in excess of 35 miles per hour [and] for purposes of Chapter 8 of Title 46.2, (§ 46.2-800 et seq.), . . . a vehicle while operated on a highway." Va. Code Ann. § 46.2-100.

Instruction No. 17.000 defines the requirements for headlights, Instruction No. 17.010 deals with tail lights, and No. 17.020 with brake lights. Instruction No. 17.030 sets forth the statutory requirement for a horn while Nos. 17.040–17.060 do the same for brakes, mirrors, and windshield wipers. Instruction No. 17.070 describes the statutory duty of a driver whose load extends beyond the rear of his vehicle to provide a flag or warning light, and Instruction No. 17.080 addresses the maximum distance a load may extend beyond the side of a vehicle.

These equipment instructions state how a vehicle is to be equipped. They do not say that a driver has a duty to equip his vehicle according to the statute and they do not conclude with a paragraph that the failure to equip properly is negligence. Only when there is evidence that the driver failed to equip his vehicle properly and that such failure is the negligence sued upon, may the following sentence be added to the appropriate instructions: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." The jury should not be instructed that failure to equip is negligence when: (1) the issue is the party's failure to use existing equipment, see *Terminal Cars, Inc. v. Wagner, 205 Va. 214, 220–21, 135 S.E.2d 802, 806–07 (1964)*; (2) the violation of the statute is excusable or justifiable; (3) the plaintiff is not in the class protected by the statute; or (4) the primary thrust of plaintiff's case is some negligence other than the technical negligence of a failure to equip, see *Kinsey v. Brugh, 157 Va. 407, 411, 161 S.E. 41, 42 (1931)*; *Carlton v. Boudar, 118 Va. 521, 531, 88 S.E. 174, 178 (1916)*.

For a discussion of negligence, negligence per se, and negligence as a matter of law, see the Scope Note in Chapter 4, Negligence.

## Instruction No. 17.000
## Headlights: Requirements

**Every motor vehicle operated on a highway shall be equipped with at least two headlights at the front of and on opposite sides of the vehicle. On low beam, headlights must be nonglaring and must reveal persons and objects at least 100 feet ahead; on high beam, they must reveal persons and objects at least 350 feet ahead.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. §§ 46.2-1011, 46.2-1031, 46.2-1032.

**CASE AUTHORITY**: *Jones v. Aluminum Window & Door Corp., 201 Va. 283, 292–93, 110 S.E.2d 531, 537–38 (1959)*; *Reid v. Boward, 181 Va. 718, 723, 26 S.E.2d 27, 29 (1943)*; *Barry v. Tyler, 171 Va. 381, 387, 199 S.E. 496, 499 (1938)*; *Carlton v. Boudar, 118 Va. 521, 530–31, 88 S.E. 174, 178 (1916).*

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-1031 also provides for the use of single-beam headlights rather than multiple-beam headlights. Because single-beam headlights are rare, this was left out of the instruction. If a case arises in which an automobile had single-beam headlights, this instruction should be adjusted to conform to Va. Code Ann. § 46.2-1031.

### *ALERTS:*

- This instruction is drafted to complement the instructions on lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), though there may be cases where the failure to properly equip is alleged as the basis of a finding of negligence *per se.* In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, above.

- The requirement of at least two headlights does not apply to a motorcycle, autocycle, road roller, road machinery, or tractor used on a highway. Va. Code Ann. § 46.2-1011.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.010
## Tail Lights: Requirements

**Every** [motor vehicle; trailer; semitrailer] **operated on a highway shall carry at the rear two red lights plainly visible in clear weather from a distance of 500 feet to the rear of the vehicle.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. § 46.2-1013.

**CASE AUTHORITY**: *Hall v. Hockaday, 206 Va. 792, 797–98, 146 S.E.2d 215, 219 (1966)*; *Reid v. Boward, 181 Va. 718, 723, 26 S.E.2d 27, 29 (1943).*

### PRACTICE COMMENTARY

See Instruction No. 10.030, Lookout: When Lights to Be Lighted.

### *ALERTS:*

- This instruction is drafted to complement the instructions on lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), though there may be cases where the failure to properly equip is alleged as the basis of a finding of negligence *per se*. In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent."

- The requirement of at least two red tail lights does not apply to motorcycles and autocycles. Va. Code Ann. § 46.2-1012.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.020
## Brake Lights: Requirements

**Every** [motor vehicle; trailer; semitrailer] **operated on a highway shall be equipped with at least two brake lights that automatically exhibit a red or amber light plainly visible in clear weather from a distance of 500 feet to the rear of the vehicle when the brake is applied.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1014.

**CASE AUTHORITY:** *Reid v. Boward, 181 Va. 718, 722, 26 S.E.2d 27, 29 (1943).*

### PRACTICE COMMENTARY

The statute applies, by its terms, only to vehicles "registered in the Commonwealth and operated on the highways in the Commonwealth."

### *ALERTS:*

- This instruction is drafted to complement the instructions on lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), though there may be cases where the failure to properly equip is alleged as the basis of a finding of negligence *per se*. In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, *above*.

- The statute upon which this instruction is based does not apply to antique vehicles not originally equipped with a brake light. Va. Code Ann. § 46.2-1014.

- In the instance of a Virginia registered passenger car manufactured during or after 1986, Va. Code Ann. § 46.2-1014.1 imposes an additional requirement of a supplemental center-high-mount stop light. It may be appropriate to modify the instruction accordingly.

- The requirement of at least two brake lights does not apply to motorcycles or autocycles. Va. Code Ann. § 46.2-1014. Va. Code Ann. § 46.2-1012 requires at least one brake light of a type approved by the Superintendent of the Department of State Police.

- In addition to having two red or amber tail lights visible at a distance of 500 feet, the lights (or any vehicle equipment) must not be defective or otherwise unsafe. Va. Code Ann. § 46.2-1003; *Otey v. Commonwealth, 61 Va. App. 346, 349–51, 735 S.E.2d 255, 257–58 (2012).*

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

**Instruction No. 17.030**
**Horn: Requirements**

**Every motor vehicle operated on a highway shall be equipped with a working horn capable of being heard under normal conditions for at least 200 feet.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. § 46.2-1059.

**CASE AUTHORITY**: None.

### PRACTICE COMMENTARY

For specific instances where operating a motorcycle without a horn on a public highway is permitted, see Va. Code Ann. § 46.2-912.

### *ALERTS:*

• This instruction is drafted to complement the lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), and overtaking and passing instructions (Instruction Nos. 10.170 and 10.180), though there may be cases where the failure properly to equip is alleged as the basis of a finding of negligence *per se*. In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, *above*.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.040
## Brakes: Requirements

**Every** [motor vehicle; bus; truck] **operated on a highway shall be equipped with brakes in good working order capable of stopping the** [vehicle; bus; truck] **within** (insert applicable required stopping distance based on category of vehicle as prescribed in Va. Code Ann. § 46.2-1067) **when such vehicle is traveling at 20 miles per hour on a dry, hard, level stretch of highway free from loose material.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. §§ 46.2-1066, 46.2-1067.

**CASE AUTHORITY**: *Bentley v. Felts, 248 Va. 117, 120–21, 445 S.E.2d 131, 133–34 (1994)*; *Stratton v. Bergman, 169 Va. 249, 254–55, 192 S.E. 813, 815 (1937).*

### PRACTICE COMMENTARY

The required stopping distances prescribed by category of vehicle in Va. Code Ann. § 46.2-1067 are as follows:

Passenger motor vehicles, except buses and antique vehicles, 25 feet.

Motor vehicles registered or qualified to be registered as antique vehicles, when equipped with four-wheel brakes, 25 feet.

Motorcycles or autocycles, 30 feet.

Buses, trucks, and tractor-trucks, 40 feet.

All combinations of vehicles, 40 feet.

Motor vehicles registered or qualified to be registered as antique vehicles, when equipped with two-wheel brakes, 45 feet.

Va. Code Ann. § 46.2-1066 also provides that every electric personal assistive mobility device, such as a scooter for the handicapped, be equipped with a brake system to enable a controlled stop when operated on the highway.

### *ALERTS:*

- This instruction is drafted to complement Instruction No. 10.070, Control: Brake Requirements, though there may be cases where the failure properly to equip is alleged as the basis of a finding of negligence *per se*. In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, *above*.

- The Supreme Court previously held that a sudden failure of brakes without any warning may lead to an "unavoidable accident" without any negligence on the part of the driver. *Culberson v. McCloud, 227 Va. 249, 252–53, 315 S.E.2d 219, 221 (1984)*; *Simmons v. Adams, 202 Va. 926, 930, 121 S.E.2d 379, 382 (1961)*; *Rountree v. Rountree, 198 Va. 658, 663, 96 S.E.2d 113, 116 (1957)*. The Court has since abrogated the unavoidable accident doctrine, holding that the instruction should be excluded altogether and that it is error not to do so. *Hancock-Underwood v. Knight, 277 Va. 127, 134–36, 670 S.E.2d 720, 724–25 (2009).*

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.050
## Mirrors: Requirements

**Every motor vehicle operated on the highway must be equipped with one outside and one inside mirror located so as to give the driver a view of the highway for at least 200 feet to the rear of the vehicle.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1082.

**CASE AUTHORITY:** *Neighbors v. Moore, 216 Va. 514, 518 n.1, 219 S.E.2d 692, 696 n.1 (1975)*; *Drumwright v. Walker, 167 Va. 307, 314, 189 S.E. 310, 313 (1937).*

### PRACTICE COMMENTARY

The language of Va. Code Ann. § 46.2-1082 suggests that vehicles not registered in Virginia need have only one mirror. The Committee expresses no opinion as to the application of the statute in cases where negligence is alleged because of failure properly to equip an out-of-state car.

☞ ***PRACTICE POINTER:*** For an exception to the requirement of an inside mirror, see Va. Code Ann. § 46.2-1082.

### *ALERTS:*

- This instruction is intended to complement the instructions on lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), though there may be cases where the failure properly to equip is alleged as the basis of a finding of negligence *per se.* In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, *above.*

- Cars manufactured before 1969 need have only one mirror, either inside or outside, capable of giving the driver a view of the highway for at least 200 feet to the rear. Va. Code Ann. § 46.2-1082.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.060
## Windshield Wipers: Requirements

**Every motor vehicle operated on a highway shall be equipped with mechanically or electrically operated windshield wipers which shall clean both the right and left sides of the windshield.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1055.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction is intended to complement the instructions on lookout (Instruction Nos. 10.000, 10.020, 10.025, and 10.030), though there may be cases where the failure properly to equip is alleged as the basis of a finding of negligence *per se*. In such cases, the following sentence should be added: "If the driver of a vehicle fails to equip his vehicle properly, then he is negligent." See Scope Note, *above*.

- Vehicles manufactured or assembled before 1943 need only have a single windshield wiper that cleans the driver's side. Va. Code Ann. § 46.2-1055.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.070
## Flag or Light at the End of Load

**Whenever the load on any vehicle extends more than four feet beyond the vehicle, a red flag measuring at least twelve inches by twelve inches shall be displayed at the end of the load. The flag must be clearly visible at all times from the rear of the load.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-1121.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- If the accident clearly occurred at night, the following should be substituted: "Whenever the load on any vehicle extends more than four feet beyond the vehicle, a red light shall be displayed at the end of the load from sunset to sunrise. The red light must be plainly visible in clear weather at least 500 feet to the sides and rear of the vehicle." Va. Code Ann. § 46.2-1121.

- If it is a jury question whether the accident occurred between sunset and sunrise, both the instruction and the substitute suggested above should be read, with appropriate explanations.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.080
## Projection of Load

**No vehicle may carry a load that extends more than six inches beyond the line of the fender or body on the left or right side of the vehicle.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. § 46.2-1111.

**CASE AUTHORITY**: *Lawson v. John Doe, 239 Va. 477, 478, 391 S.E.2d 333, 333 (1990); Atlantic Greyhound Corp. v. Shelton, 184 Va. 684, 689–90, 36 S.E.2d 625, 627 (1946).*

### PRACTICE COMMENTARY

None.

☞ ***PRACTICE POINTER:*** For statutes establishing total outside width, see Va. Code Ann. §§ 46.2-1105 (width of vehicles generally), 46.2-1107 (bus widths in certain counties), 46.2-1108 (bus widths to comply with federal law), and 46.2-1109 (widths of commercial vehicles).

### *ALERTS:*

- There is a statutory exception for watercraft carried on vehicles. Va. Code Ann. § 46.2-1111.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Automobiles §§ 1 through 6, 12 through 28, 47 through 66

## Instruction No. 17.090
## Airbags

**The sale, installation, reinstallation or replacement of:**

**(1) a counterfeit air bag or non-functional air bag, or**

**(2) an air bag previously installed in another vehicle or not in accordance with federal safety regulations, without the present vehicle owner's knowledge,**

**shall not be construed as a superseding cause that limits the liability of any party.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE**: Va. Code Ann. § 46.2-1088.3.

**CASE AUTHORITY**: None.

### PRACTICE COMMENTARY

This instruction also applies to other components of a vehicle's inflatable restraint system in addition to air bags. If the case requires, language naming those components should be substituted for "air bag" in the above instruction. Va. Code Ann. § 46.2-1088.3(B)–(C). See Instruction No. 5.010, Definition of Superseding Cause, for an instruction that may be applicable in those situations.

### *ALERTS:*

- The provisions of Va. Code Ann. § 46.2-1088.3 do not apply to the sale, installation, reinstallation, or replacement of any motor vehicle airbag on vehicles used solely for police work, as described in Va. Code Ann. § 46.2-750.1.

# Chapter 18

# RAILROADS—CROSSINGS

## Scope Note


| | |
|---|---|
| Instruction No. 18.000 | Driver's Duty to Look and Listen |
| Instruction No. 18.010 | When Driver Has Duty to Look and Listen for Approaching Trains |
| Instruction No. 18.020 | Driver's Duty to Look and Listen at Crossing Even If There Is No Warning of a Train |
| Instruction No. 18.030 | Passenger's Duty to Look and Listen |
| Instruction No. 18.040 | Driver's Duty While Removing Vehicle From Tracks |
| Instruction No. 18.050 | Driver's Statutory Duty to Stop at Crossing |
| Instruction No. 18.060 | Duty of Driver of School Bus, Vehicle for Hire, or Vehicle Carrying Explosives or Flammables |
| Instruction No. 18.070 | Driver's Duty at Crossing Barrier |
| Instruction No. 18.080 | Railroad's Duty to Sound Whistle, Horn, or Bell |
| Instruction No. 18.081 | Railroad's Duty to Sound Horn |
| Instruction No. 18.090 | Finding Instruction: Comparative Negligence; Railroad's Duty to Sound Warnings at Crossings |
| Instruction No. 18.100 | Railroad's Common Law Duty to Warn That Train Is Approaching Crossing |
| Instruction No. 18.110 | Positive and Negative Testimony |
| Instruction No. 18.130 | Railroad's Duty to Keep Reasonable Lookout |
| Instruction No. 18.140 | Railroad's Train Speed at Grade Crossing |
| Instruction No. 18.150 | Railroad's Train Speed at Grade Crossing: Ordinance |
| Instruction No. 18.160 | Railroad's Duty to Place and Maintain Warning Signal Boards (Crossbucks) |
| Instruction No. 18.170 | Railroad's Duty to Place and Maintain Warning Devices at Crossings |
| Instruction No. 18.180 | Railroad's Duty to Place Warning Devices at Dangerous Crossings |
| Instruction No. 18.190 | Railroad's Duty to Remove Trees and Brush From Right-of-Way |
| Instruction No. 18.191 | Railroad's Duty to Remove Vegetation Obstructing Sightlines |
| Instruction No. 18.192 | Railroad's Duty to Clear Obstructions from Sightlines |
| Instruction No. 18.200 | Railroad's Duty to Keep Crossings in Repair |

# SCOPE NOTE

These instructions cover the duties of railroads, drivers, and passengers at grade crossings. The duties of a railroad to its employees under the Federal Employers Liability Act and the Safety Appliance Act are covered in Chapter 21, Railroads—Federal Employers Liability Act; the duties of a railroad to persons on the tracks are covered in Chapter 19, Railroads—Right-of-Way; and the duties of a railroad to employees of the consignees of its freight cars and for fires started by its engines are covered in Chapter 20, Railroads—Miscellaneous.

There are five instructions that cover a driver's common law duties at railroad grade crossings. Three of these, Instruction Nos. 18.000, 18.010, and 18.020, concern a driver's common law duty to look and listen before crossing a railroad track. There is a duty to look and listen before crossing but no common law duty to stop before crossing unless ordinary care requires stopping. Instruction No. 18.030 concerns a passenger's common law duty to look and listen as the vehicle in which he is riding approaches the tracks. Instruction No. 18.040 concerns the common law duty of a person removing a stalled vehicle from the tracks to get off the tracks when a train approaches.

There are three instructions on a driver's statutory duties to stop at railroad grade crossings. Instruction No. 18.050 covers a driver's duty to stop at a grade crossing after the railroad has given the proper statutory warnings of the immediate approach of its train. Instruction No. 18.060 covers the duty of the driver of a school bus, a vehicle for hire (normally a common carrier), or a vehicle carrying explosives or flammable liquids to stop at grade crossings. Instruction No. 18.070 covers a driver's duty not to drive around a crossing gate.

When an instruction is taken from a statute, such as the three instructions just mentioned, there are two important inquiries: (1) Does the statute apply both within and outside of incorporated cities and towns; and (2) does it apply at both public and private grade crossings?

The statutory duties to stop expressed in Instruction Nos. 18.050 and 18.060 apply at both public and private grade crossings but only when those crossings are outside of incorporated cities or towns. Va. Code Ann. §§ 46.2-885(A) and 46.2-886. The statute does not clearly limit the duty not to drive around a crossing gate, expressed in Instruction No. 18.070, to crossings outside of incorporated cities and towns; it applies at all crossings. Va. Code Ann. § 46.2-885(B). An incorporated city or town may, by ordinance, create a duty like that expressed in Instruction Nos. 18.050, 18.060, and 18.070. Where such an ordinance exists, it has the same effect as a statute.

There are thirteen instructions concerning a railroad's duties at grade crossings. The duties may be divided into two categories: (1) duties involving the train itself; and (2) duties involving the crossing and crossing area.

The Federal Railroad Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20101 et seq., applies to cases involving accidents at public crossings. It contemplates a comprehensive and uniform set of safety regulations in all areas of railroad operations. FRSA limits preemption to those matters where the applicable federal regulations completely "cover" or "subsume" state law on the question; state and local governments may

regulate other matters. 49 U.S.C. § 20106(a)(1)–(2). In addition, a state may adopt or continue an "additional or more stringent" law, regulation, or order where necessary to eliminate or reduce an "essentially local" safety or security hazard, as long as it neither conflicts with federal law nor unreasonably burdens interstate commerce. 49 U.S.C. § 20106(a)(2); see *CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)*. For example, because 49 C.F.R. § 213.37 addresses the obstruction of sightlines due specifically to an overgrowth of vegetation "on or immediately adjacent to the roadbed," claims based on such vegetation are preempted, whereas claims for obstruction of sightlines due to vegetation that is not "on or immediately adjacent to the roadbed" are not preempted. Furthermore, the federal regulations do not apply to private crossings, resulting in FRSA preemption of private crossings only where a regulation relates to crossings in general, such as the federal railroad speed limit standards discussed in Instruction No. 18.140.

The 2007 Preemption Clarification Amendment clarified that FRSA does *not* preempt actions under state law for damages for personal injury, death, or property damage alleging a breach of the federal standard of care established by a regulation or order issued by the Secretary of Transportation, a violation of a railroad's internal rule based on a federal regulation, or a state law claim on an issue not within the parameters of the relevant federal regulations. 49 U.S.C. § 20106(b)–(c). So even though state and local governments may not be permitted to regulate areas covered by FRSA, state law claims for personal injury, death, or property damage may be based on FRSA safety regulations governing railroad operations.

Instruction No. 18.080 states the statutory duty to sound a warning before crossing a highway. If a railroad fails to sound the required warnings at a crossing, a contributorily negligent driver or passenger may still recover, but his damages must be reduced to reflect that contributory negligence. Instruction No. 18.090 states the rule, based on Va. Code Ann. § 56-416, to be applied in such situations, which is analogous to the concept of comparative negligence. Instruction No. 18.081 states the federal duty regarding when a railroad must sound its horn. Instruction No. 18.100 states the common law duty to sound a warning. Instruction No. 18.110 discusses the strength of evidence that a warning was sounded as opposed to evidence that it was not.

Instruction No. 18.130 states the duty to keep a reasonable lookout. Instruction Nos. 18.140 and 18.150 state a railroad's duty to control the speed of its trains. Ordinances applicable inside incorporated cities and towns set specific speed limits. Where no local ordinance applies, i.e., outside a city or town, the speed limit depends on the type of train and the classification of the tracks in question.

Instruction Nos. 18.160, 18.170, and 18.180 cover the various crossing protection devices—crossbucks, flashing lights, and gates—that are required by statute at various grade crossings. Instruction Nos. 18.190 and 18.191 state the duty to allow good visibility at a crossing by clearing vegetation and other obstructions. Instruction No. 18.200 discusses a railroad's statutory duty to keep its crossings in good repair.

Note that the duties expressed in Instruction Nos. 18.080, 18.081, 18.090, 18.160, 18.170, 18.180, 18.190, 18.191, and 18.200 apply at public grade crossings. Under certain circumstances, however, a private crossing may gain the attributes of a public crossing under Virginia law, and a railroad will have public crossing duties at the private crossing. *Chesapeake & Ohio Ry. v. Pulliam, 185 Va. 908, 912–13, 41 S.E.2d 54, 56 (1947)*. These instructions may then be given in a case involving an accident at

such a private crossing. Specifically, "constant or frequent use by the public of a private crossing, with the knowledge and acquiescence of the railway company, may give to such a passageway the attributes of a public crossing and cast upon the railway company the duty of exercising ordinary care for the safety of such users." *Chesapeake & Ohio Ry. Co. v. Faison, 189 Va. 341, 345, 52 S.E.2d 865, 867 (1949)*; see *Norfolk & W. Ry. Co. v. Fletcher, 198 Va. 397, 400–01, 94 S.E.2d 251, 254 (1956).* In addition, whether the instructions apply inside or outside of incorporated cities or towns must be determined by examining each statute.

## Instruction No. 18.000
## Driver's Duty to Look and Listen

**The driver of a vehicle has a duty to use ordinary care to look and listen effectively for an approaching train before crossing the tracks and a duty to stay off the tracks if he becomes aware of an approaching train.**

**If a driver fails to perform either or both of these duties, he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *RGR, LLC v. Settle, 288 Va. 260, 284–85, 764 S.E.2d 8, 22–23 (2014)*; *Wright v. Norfolk & W. Ry. Co., 245 Va. 160, 170–71, 427 S.E.2d 724, 730 (1993)*; *Bunn v. Norfolk, Franklin & Danville Ry. Co., 217 Va. 45, 53, 225 S.E.2d 375, 380 (1976)*; *Norfolk & W. Ry. Co. v. Hagy, 201 Va. 183, 187–88, 110 S.E.2d 177, 181 (1959)*; *Southern Ry. Co. v. Wilson, 196 Va. 883, 887–88, 86 S.E.2d 53, 55 (1955)*; *Southern Ry. Co. v. Campbell, 172 Va. 311, 317–18, 1 S.E.2d 255, 257–58 (1939)*.

### PRACTICE COMMENTARY

When approaching a railroad crossing, a person has the duty to look and listen with reasonable care. He does not have an absolute duty to discover the presence of a train, unless by so looking and listening he was bound to have discovered it. A railroad track is a proclamation of danger and the operator of a vehicle approaching a grade crossing is required to look and listen at a time and place when both looking and listening will be effective, intelligently using both eyes and ears. *RGR, LLC, 288 Va. at 284, 764 S.E.2d at 22*. The fact that one is traveling in a covered or enclosed vehicle that interferes with his sight does not excuse him from looking or listening for approaching trains at a railroad crossing but calls on him to use increased care commensurate with the situation. *Hagy, 201 Va. at 188, 110 S.E.2d at 181*. The greater the danger at a particular crossing, the greater the vigilance that is required. *Wright*, 245 Va. at 171, 427 S.E.2d at 730. If a traveler drives blindly upon a crossing whether his view is obstructed or unobstructed, takes no precautions for his safety, and is injured as a result, his negligence will preclude any recovery on his part. *RGR, LLC, 288 Va. at 284, 764 S.E.2d at 22*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.010
## When Driver Has Duty to Look and Listen for Approaching Trains

**The driver of a vehicle has a duty to look and listen for an approaching train when he knows, or by the exercise of reasonable care should know, that he is approaching a railroad crossing.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *RGR, LLC v. Settle, 288 Va. 260, 284–86, 764 S.E.2d 8, 22–23 (2014)*; *John F. Ivory Storage Co. v. Atlantic Coast Line R.R., 187 Va. 857, 874, 48 S.E.2d 242, 251 (1948).*

### PRACTICE COMMENTARY

See Practice Commentary following Instruction No. 18.000. This instruction may be given in addition to Instruction No. 18.000, when appropriate.

See Instruction Nos. 18.160, 18.170, and 18.180 for a railroad's duty to warn of the existence of a crossing with appropriate markers.

### *ALERTS:*

• Where the driver is familiar with the road and, therefore, with the fact that railroad tracks cross the road, this instruction is probably inappropriate. See *Norfolk & W. Ry. Co. v. Greenfield, 219 Va. 122, 133, 244 S.E.2d 781, 787 (1978).* Even though there may be no duty to look and listen for a train, generally there is still a duty to keep a proper lookout. See Instruction No. 10.020, Scope of Duty to Keep Proper Lookout.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.020
## Driver's Duty to Look and Listen at Crossing Even If There Is No Warning of a Train

**The driver of a vehicle has a duty to use ordinary care to look and listen effectively for an approaching train before crossing the tracks even if a railroad fails to** [lower the crossing gate; sound a whistle or horn or bell; give a flag signal; etc.] **as a warning that its train is approaching the crossing.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Hagy, 201 Va. 183, 190–91, 110 S.E.2d 177, 183 (1959); Southern Ry. Co. v. Thompson, 186 Va. 106, 112–14, 41 S.E.2d 456, 459–60 (1947).*

### PRACTICE COMMENTARY

When automatic safeguards are not properly maintained, the question of whether the plaintiff used ordinary care is particularly for the jury. *Virginia & Maryland R.R. Co. v. White, 228 Va. 140, 146–47, 319 S.E.2d 755, 759 (1984).*

### *ALERTS:*

- If the employees in charge of any train fail to give the signals required by law when approaching a grade crossing of a public highway not protected by certain enumerated operating protective device(s), the failure of a traveler on such highway to exercise due care in approaching the grade crossing does not bar recovery for injury to his person, or damage to property in his charge, if struck by the train. However, the failure of the traveler to exercise due care may be considered in mitigation of damages. Va. Code Ann. § 56-416. See also Instruction No. 18.090.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.030
## Passenger's Duty to Look and Listen

**A passenger in a vehicle has no duty to be as observant as the driver. However, a passenger who sees, or should then be aware of, a railroad crossing ahead has a duty to use ordinary care to look and listen effectively for an approaching train and to warn the driver of danger if:**

**(1) a reasonably observant person would have seen the train;**

**(2) it is apparent to the passenger that the driver has not seen the danger; and**

**(3) the passenger then has enough time to warn the driver of the danger.**

**If a passenger fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 546–47, 178 S.E.2d 499, 503 (1971)*; *Mann v. Norfolk & W. Ry. Co., 199 Va. 604, 610–11, 101 S.E.2d 535, 539–540 (1958)*; *Butler v. Darden, 189 Va. 459, 465–66, 53 S.E.2d 146, 149 (1949)*; *Chesapeake & Ohio R. R. Co. v. Meyer, 150 Va. 656, 666, 143 S.E. 478, 482 (1928).*

### PRACTICE COMMENTARY

This is a complex instruction because a passenger's duty to look and listen effectively and then warn the driver is conditional. A passenger has a general obligation to use ordinary care to look and listen effectively only if the passenger actually sees the railroad crossing or if the passenger is familiar with the crossing and is apparently aware that it is about to be reached. *Mann, 199 Va. at 610, 101 S.E.2d at 539*; *Butler, 189 Va. at 465–66, 53 S.E.2d at 149*. The danger, if apparent to the passenger, must have existed for a sufficient length of time to allow him to give a warning. *Atlantic Coast Line RR. Co. v. Withers, 192 Va. 493, 509, 65 S.E.2d 654, 662 (1951); Mize v. Gardner Motor Co., 166 Va. 415, 422, 186 S.E. 108, 111 (1936).*

See Instruction No. 13.000, and the cases cited therein, for a discussion of a passenger's duty to keep a lookout when no railroad crossing is involved.

☞ ***PRACTICE POINTER:*** This instruction should normally be used in conjunction with Instruction Nos. 6.000 and 6.040 to 6.060 on Contributory Negligence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.040
## Driver's Duty While Removing Vehicle From Tracks

**The driver of a vehicle has a duty to use ordinary care for his own safety when attempting to remove his stalled vehicle from the tracks.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Seaboard Air Line R.R. Co. v. Crowder, 191 Va. 635, 644–45, 62 S.E.2d 227, 232 (1950)*; *Horsley v. Chesapeake & Ohio Ry. Co., 191 Va. 628, 633–34, 61 S.E.2d 868, 871 (1950).*

### PRACTICE COMMENTARY

Presumably, anyone who helps remove a stalled or disabled vehicle from the tracks also has a duty to use ordinary care. If your case involves someone other than the driver, substitute "a person" for "the driver of a vehicle," "a stalled vehicle" for "his stalled vehicle," and "person" for "driver."

If, however, a person not the driver is injured while attempting to remove another from a stationary vehicle upon the tracks, Instruction No. 7.020, Rescue, may be appropriate.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.050
## Driver's Statutory Duty to Stop at Crossing

**The driver of a vehicle has a duty to stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of the railroad and to remain stopped until he can proceed safely. This duty shall apply** [when the immediate approach of a train is indicated with a clearly visible (electrical; mechanical) signal device; when a crossing gate is lowered; when a flagman gives or continues to give a signal of the approach or passage of a train; when an approaching train signals with a (whistle; horn; bell); when an approaching (train; self-propelled machinery; automobile type vehicle traveling on a railroad track) is plainly visible and dangerously close to the crossing regardless of whether a clearly visible electric or mechanical signal device or flagman gives warning].

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-885(A).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Va. Code Ann. § 46.2-885(A) states, in pertinent part: "Except in cities or towns, whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of the vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely."

A driver has no common law duty to stop at a crossing unless stopping is necessary to exercise care commensurate with the circumstances. *Chesapeake & Ohio Ry. Co. v. Crum, 140 Va. 333, 346–48, 125 S.E. 301, 305 (1924).*

A traveler also has a duty to stop and remain stopped where the railroad has given the signals required under Va. Code Ann. § 56-414: whistle, horn, or bell. If a case presents those facts, Instruction No. 18.080 should be used in conjunction with this instruction.

### *ALERTS:*

- This instruction is applicable to both public and private grade crossings, but only to crossings located outside of incorporated cities or towns. Va. Code Ann. § 46.2-885(A).

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.060
## Duty of Driver of School Bus, Vehicle for Hire, or Vehicle Carrying Explosives or Flammables

**The driver of a** [school bus; motor vehicle carrying passengers for hire; vehicle carrying explosives or flammables as a cargo or part of a cargo] **has a duty at a railroad crossing:**

**(1) to stop his vehicle within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of the railroad;**

**(2) while stopped, to listen and look in both directions along the track for any indication of an approaching train;**

**(3) to proceed only when he can do so safely; and**

**(4) to cross only in such gear of the vehicle that there will be no necessity to change gears while crossing the tracks.**

**If a driver fails to perform one or more of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-886.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This instruction sets forth the duty of the driver of a vehicle carrying passengers for hire (usually a common carrier; see Instruction Nos. 22.000, et seq.), of a school bus, or of a vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo to stop at a grade crossing.

☞ ***PRACTICE POINTER:*** By statute, there is no duty to stop "where a police officer or a traffic control signal directs traffic to proceed." Va. Code Ann. § 46.2-886. See generally the instructions in Chapter 12, Motor Vehicles—School Buses.

### *ALERTS:*

- This instruction is applicable at both public and private grade crossings, but only to crossings located outside of incorporated cities and towns. Va. Code Ann. § 46.2-886.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.070
## Driver's Duty at Crossing Barrier

**The driver of a vehicle has a duty not to drive** [through; around; under] **any crossing** [gate; barrier] **at a railroad crossing while it is** [closed; being opened; being closed]**.**

**If a driver fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 46.2-885(B).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction is applicable at both public and private grade crossings, including those located inside incorporated cities or towns. Notice the difference in language between the first sentence of Va. Code Ann. § 46.2-885(A) and Va. Code Ann. § 46.2-885(B). In contrast, Instruction No. 18.050 applies only outside of incorporated cities or towns.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.080
## Railroad's Duty to Sound Whistle, Horn, or Bell

**A railroad has a duty to sharply sound a locomotive** [whistle; horn] **twice when the engine is between 300 and 600 yards from a public** [highway; crossing] **and to then** [ring; sound] the locomotive [bell; whistle; horn] **continuously or alternately until the engine reaches the public** [highway; crossing]**.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-414.

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Greenfield, 219 Va. 122, 129–30, 244 S.E.2d 781, 784–85 (1978).*

### PRACTICE COMMENTARY

49 C.F.R. § 222.21(a) mandates when a railroad must sound a horn at a public crossing. However, states are permitted to adopt or continue in force laws that are "not incompatible" with federal laws and regulations. 49 U.S.C. § 20106(a)(2). When a plaintiff asserts that the railroad did not comply with federal regulations, the standards governing the railroad's conduct will be those set forth in federal—not state—regulations.

### *ALERTS:*

- When the crossing is located within an incorporated city or town, the signals given must comply with local ordinances. The warnings enumerated in this instruction do not have to be given when the crossing is in an incorporated city or town unless that city or town has adopted the requirements of Va. Code Ann. § 56-414.

- If a bell is used, it must be one of ordinary size. Va. Code Ann. § 56-414. The term "ordinary size" is undefined. Therefore, unless there is evidence creating a jury issue as to what is "ordinary size" and whether the locomotive in question was so equipped, those words should be omitted from the instruction.

- This instruction applies only where a railroad crosses a public highway or crossing on the same level. Va. Code Ann. § 56-414.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.081
## Railroad's Duty to Sound Horn

**A railroad approaching a public highway rail grade crossing has a duty to sound its horn, with two long blasts, one short blast, and one long blast, beginning between 15 and 20 seconds before entering the crossing and continuing until it occupies the crossing.**

**If a railroad fails to perform this duty, then it is negligent** [unless (the engineer in good faith began sounding the horn between 20 and 25 seconds before the crossing because he was unable to precisely estimate the time of arrival in the crossing; the train was traveling faster than 60 mph and began sounding its horn a quarter mile before the crossing; the train was stopped in close proximity to the crossing and the engineer could determine that the crossing was not obstructed and that [the crossing was equipped with automatic flashing lights and gates and the gates were fully lowered; there were no conflicting highway movements approaching the crossing])].

## SOURCES & AUTHORITY

**GOVERNING AUTHORITY:** 49 C.F.R. § 222.21.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

49 C.F.R. § 222.21, regarding when a railroad must use its horn, preempts Va. Code Ann. § 56-414. However, a plaintiff may bring a state law claim based on a railroad's violation of the federal standard of care set forth in 49 C.F.R. § 222.21. The court may then give either this instruction as to the railroad's duty to sound the horn approaching a crossing or Instruction No. 18.100 as to its general duty to give an adequate, reasonable, and timely warning of its approach to the crossing.

### *ALERTS:*

- When the crossing is located within an incorporated city or town, the signals given must comply with local ordinances. The warnings enumerated in this instruction do not have to be given when the crossing is in an incorporated city or town unless that city or town has adopted the requirements of Va. Code Ann. § 56-414.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

**Instruction No. 18.090**
**Finding Instruction: Comparative Negligence; Railroad's Duty to Sound Warnings at Crossings**

**If you find by the greater weight of the evidence that:**

**(1) the railroad failed to sound a** [whistle; horn; bell] **while approaching a crossing; and**

**(2) the driver failed to exercise ordinary care in approaching the crossing; and**

**(3) the railroad's negligence in failing to sound a** [whistle; horn; bell] **while approaching the crossing and the driver's failure to exercise ordinary care in approaching the crossing combined to cause the driver's injuries;**

**then the driver may recover, but you are required to reduce his damages by the proportion that the driver's failure to exercise ordinary care proximately contributed to the accident.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 56-414, 56-416.

**CASE AUTHORITY:** *Skinner v. Norfolk & W. Ry. Co., 206 Va. 649, 653–54, 145 S.E.2d 170, 173 (1965)*; *Virginian Ry. Co. v. Craighead, 193 Va. 300, 303–04, 68 S.E.2d 647, 650 (1952)*; *Chesapeake & Ohio Ry. v. Pulliam, 185 Va. 908, 916–18, 41 S.E.2d 54, 58–59 (1947)*; *Norfolk & W. Ry. Co. v. Hardy, 152 Va. 783, 797, 148 S.E. 839, 843 (1929)*; *Southern Ry. Co. v. Johnson, 151 Va. 345, 354, 146 S.E. 363, 365–66 (1928).*

## PRACTICE COMMENTARY

This instruction applies to a state law claim that the railroad was negligent in failing to sound any whistle, horn, or bell when approaching a crossing. Federal preemption applies to 49 C.F.R. § 222.21(a), which mandates when a railroad must sound a horn at a public crossing.

This instruction applies where Va. Code Ann. § 56-414 was applicable to the crossing (i.e., it was a public crossing either outside an incorporated city or town or inside an incorporated city or town that had adopted the requirements of Va. Code Ann. § 56-414 by ordinance) and the required warning allegedly was not given. If Va. Code Ann. § 56-414 was not applicable, the comparative negligence features of Va. Code Ann. § 56-416 do not apply, this instruction should not be given, and contributory negligence can bar recovery. *Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 545–46, 178 S.E.2d 499, 502–03 (1971).*

The text of this instruction is based on Va. Code Ann. §§ 56-414 and 56-416, which state that they apply to "a grade crossing of a public highway." See the Scope Note for circumstances under which a private crossing may gain the attributes of a public crossing under Virginia law; this instruction may then be given in a case involving an accident at such a private crossing. *Pulliam, 185 Va. at 912–13, 41 S.E.2d at 56.*

An injured traveler is entitled to recover some amount of damages no matter how much his negligence exceeded that of the railroad. See *Pulliam, 185 Va. at 916–917, 41 S.E.2d at 57–58.* This means that a driver is entitled to recover if the failure of the railroad to give signals contributed in any way to the accident, regardless of the extent of the driver's negligence. *Johnson, 151 Va. at 354, 146 S.E.2d at 365.*

The statute refers to the traveler's negligence as being "in mitigation" of his damages. A number of cases have discussed this mitigation as involving an apportionment of damages based on the extent of negligence of the traveler and the railroad. *Pulliam, 185 Va. at 917, 41 S.E.2d at 58*; *Johnson, 151 Va. at 354, 146 S.E.2d at 365.*

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 56-416. says that "the failure of the traveler to exercise [due] care may be considered in mitigation of damages." While the term "may" is prima facie permissive, importing discretion, the Virginia Supreme Court has, in numerous cases, consistently construed the word "may," as

used in Va. Code Ann. § 56-416, as *requiring* the jury to consider the contributory negligence of the plaintiff and to mitigate the plaintiff's damages in proportion to his negligence. *Pulliam, 185 Va. at 916, 41 S.E.2d at 58*; *Hardy, 152 Va. at 797, 148 S.E. at 842–843; Norfolk & W. Ry. Co. v. Simmons, 127 Va. 419, 427, 103 S.E. 609, 611 (1920).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.100
## Railroad's Common Law Duty to Warn That Train Is Approaching Crossing

**A railroad has a duty to give an adequate, reasonable, and timely warning of the approach of its train to the crossing.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Wright, 217 Va. 515, 519, 229 S.E.2d 890, 893 (1976)*; *Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 546, 178 S.E.2d 499, 502 (1971)*; *Norfolk & W. Ry. Co. v. Fletcher, 198 Va. 397, 400, 94 S.E.2d 251, 254 (1956)*; *Norfolk & Portsmouth Belt Line R.R. Co. v. Freeman, 192 Va. 400, 407–08, 64 S.E.2d 732, 736 (1951)*; *Atlantic Coast Line R.R. Co. v. Clements, 184 Va. 656, 665, 36 S.E.2d 553, 557 (1946).*

### PRACTICE COMMENTARY

Instruction No. 18.080 gives the statutory duty, based on Va. Code Ann. § 56-414, of a railroad to give a warning (i.e., a whistle, horn, or bell) when it approaches a crossing. This instruction expresses the common law duty that exists in the absence of, or in addition to, the requirements of Va. Code Ann. § 56-414 or any local ordinance.

Where the common law duty to warn applies instead of Va. Code Ann. § 56-414 and the concomitant comparative negligence provision of Va. Code Ann. § 56-416, contributory negligence may bar a plaintiff's recovery. *Gilliam, 211 Va. at 546, 178 S.E.2d at 503.*

A railroad may have a common law duty to blow a whistle [horn] "only if other signals were insufficient and a whistle [horn] was necessary 'to give adequate, reasonable and timely warning.' " *Wright, 217 Va. at 519, 229 S.E.2d at 893* (quoting *Gilliam, 211 Va. 545–46, 178 S.E.2d at 502–03*). 49 C.F.R. § 222.25 "does not require the routine sounding of locomotive horns at private highway-rail grade crossings. However, where State law requires the sounding of a locomotive horn at private highway-rail grade crossings, the locomotive horn shall be sounded in accordance with § 222.21 of this part." Accordingly, in a private crossing case alleging railroad negligence in failing to sound a horn, this instruction may be given in conjunction with Instruction No. 18.081.

☞ ***PRACTICE POINTER:*** This instruction might also be applicable at private crossings or at crossings within an incorporated city or town. See the Scope Note for circumstances under which a private crossing may gain the attributes of a public crossing under Virginia law; this instruction may then be given in a case involving an accident at such a private crossing.

☞ ***PRACTICE POINTER:*** There can be cases where a failure to warn claim may not involve the failure to comply with Va. Code Ann. § 56-414, for example, a railroad can fail to give adequate, reasonable, and timely warning by not having lights or deploying a flagman at a crossing. *Fletcher, 198 Va. at 400, 94 S.E.2d at 254*; *Freeman, 192 Va. at 407–08, 64 S.E.2d at 736.*

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.110
## Positive and Negative Testimony

**The testimony of a witness that he heard a warning signal from a train ordinarily outweighs the testimony of** [a witness; witnesses] **that** [he; they] **did not hear the signal unless the** [witness; witnesses] **who did not hear the signal:**

**(1) had a good opportunity to hear the signal and probably would have heard it; or**

**(2) his attention was drawn to the train as it approached the crossing.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Bunn v. Norfolk, Franklin & Danville Ry. Co., 217 Va. 45, 52, 225 S.E.2d 375, 379 (1976)*; *National Union Fire Ins. Co. v. Bruce, 208 Va. 595, 598, 159 S.E.2d 815, 818 (1968)*; *Norfolk & W. Ry. Co. v. Sykes, 200 Va. 541, 550, 106 S.E.2d 734, 741 (1959)*; *Southern Ry. Co. v. Barden, 200 Va. 98, 102–03, 104 S.E.2d 13, 16 (1958)*; *Staples v. Spence, 179 Va. 359, 362–63, 19 S.E.2d 69, 71 (1942)*.

### PRACTICE COMMENTARY

The testimony of one positive witness can outweigh the testimony of several negative witnesses. *Bunn, 217 Va. at 52, 225 S.E.2d at 379*; *Barden, 200 Va. at 103, 104 S.E.2d at 16*.

This instruction can be modified to apply to "seeing" a signal as well as hearing a signal. *Bunn, 217 Va. at 52, 225 S.E.2d at 379*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.130
## Railroad's Duty to Keep Reasonable Lookout

**A railroad has a duty to use ordinary care to keep a lookout from the train for** [vehicles; pedestrians] **approaching a crossing.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Southern Ry. Co. v. Abee, 124 Va. 379, 385, 98 S.E. 31, 33 (1919)*; *Morton v. Southern Ry. Co., 112 Va. 398, 405–06, 71 S.E. 561, 564 (1911).*

### PRACTICE COMMENTARY

A railroad has a right to assume that the vehicle or pedestrian approaching the crossing will use ordinary care until it realizes, or in the exercise of ordinary care should realize, that the vehicle or pedestrian is not going to do so. See Instruction No. 6.060, Contributory Negligence: Right to Assume Ordinary Care. See *Norfolk & W. Ry. v. Hagy, 201 Va. 183, 191, 110 S.E.2d 177, 183 (1959)*; *Nichols v. Southern Ry. Co., 187 Va. 89, 99, 45 S.E.2d 913, 917 (1948)*; *Chesapeake & Ohio R.R. Co. v. Jacobs, 166 Va. 11, 21, 183 S.E. 221, 225 (1936).*

☞ ***PRACTICE POINTER:*** If a crossing accident raises the issue of last clear chance, see Instruction Nos. 7.030 and 7.040.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.140
## Railroad's Train Speed at Grade Crossing

**A railroad running a** [freight; passenger] **train has a duty to approach a crossing at a speed of no more than** [10 mph on an Excepted Track; (10; 15) mph on a Class 1 Track; (25; 30) mph on a Class 2 Track; (40; 60) mph on a Class 3 Track; (60; 80) mph on a Class 4 Track; (80; 90) mph on a Class 5 Track].

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING AUTHORITY:** 49 C.F.R. § 213.9.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Incorporated cities and towns may have local ordinances that fix train speeds inside the boundaries of the city or town. When that is the case, use Instruction No. 18.150. When no local ordinance applies, the speed limit depends on the type of train and the classification of the tracks in question. This instruction is applicable whether a public or private crossing is involved.

Where a plaintiff alleges under state law that the railroad exceeded federal speed limits, the plaintiff may bring a state law negligence claim because 49 C.F.R. § 213.9 creates a federal standard of care. *Zimmerman v. Norfolk S. Corp., 706 F.3d 170, 178–80 (3d Cir. 2013).* The federal regulation of speed limits on certain classifications of tracks has been held to preempt state law claims where the railroad was running at a speed *below* the federally mandated limits. See *CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 (1993).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.150
## Railroad's Train Speed at Grade Crossing: Ordinance

**The railroad has a duty to approach the crossing at a speed of no more than** (number) **miles per hour.**

**If the railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Bunn v. Norfolk, Franklin & Danville Ry., 217 Va. 45, 50, 225 S.E.2d 375, 378 (1976); Chesapeake & Ohio Ry. Co. v. Meyer, 150 Va. 656, 662–63, 143 S.E. 478, 481 (1928).*

### PRACTICE COMMENTARY

This instruction is applicable where a municipal ordinance sets railroad speed limits within the municipality. Where an ordinance is applicable, failure to comply with it is negligence. *Meyer, 150 Va. at 663, 143 S.E. at 481.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.160

## Railroad's Duty to Place and Maintain Warning Signal Boards (Crossbucks)

**A railroad has a duty to place and maintain warning signals called "crossbucks" on both sides of its railroad at or near its crossings. The crossbucks must be at such heights as to be easily seen by travelers approaching from both directions of the highway, and they must bear the inscription "Railroad Crossing" in capital letters at least five inches high.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-405.2.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This instruction applies only to grade crossings at public highways. Whenever a grade crossing at a public highway is involved, the statutory duty exists regardless of whether the county, city, or town requires signal boards unless the railroad has obtained the proper statutory waivers. Va. Code Ann. § 56-405.2.

The state law duty to place and maintain protective devices at public crossings is preempted only if the railroad proves federal funds for safety devices were expended and that the planned warning devices were actually installed. See *CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 670–71 (1993).*

A state law claim that a railroad negligently failed to maintain a railroad crossing sign or negligently let it fall into disrepair, in violation of federal regulations, avoids preemption because 49 C.F.R. § 234.245 creates a federal standard of care. *Zimmerman v. Norfolk S. Corp., 706 F. 3d 170, 187–88 (3d Cir. 2013).*

☞ ***PRACTICE POINTER:*** The statute also requires that the crossbucks be well supported by posts or otherwise and that they not obstruct travel. These elements will generally not be in issue, and so they were excluded from the instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.170

## Railroad's Duty to Place and Maintain Warning Devices at Crossings

**A railroad has a duty to place and maintain warning devices with flashing lights at each crossing of a public highway. The devices must be at such height as to be easily seen by travelers and must be automatically activated by the approaching train and clearly visible to approaching travelers 200 feet from the crossing.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-406.1.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 18.160 concerning when this state law duty is preempted.

☞ ***PRACTICE POINTER:*** Under Va. Code Ann. § 56-405.1 the railroad can be relieved of its duty to maintain a grade crossing by entering an agreement with the Commissioner of Highways or the representative of the appropriate public road authority.

### *ALERTS:*

- This instruction should not be given unless the court has determined that the grade crossing warning device was required by the Commissioner of Highways or by a representative of the appropriate public road authority. In addition, the grade crossing warning device must include "flashing lights approved by the Department of Transportation." Va. Code Ann. § 56-406.1.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.180
## Railroad's Duty to Place Warning Devices at Dangerous Crossings

**A railroad has a duty to exercise ordinary care to provide such cautions or barriers as are appropriate to the nature of the crossing.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Bangley v. Virginian Ry. Co., 195 Va. 340, 346–47, 78 S.E.2d 696, 700 (1953)*; *John F. Ivory Storage Co. v. Atlantic Coast Line R.R. Co., 187 Va. 857, 870, 48 S.E.2d 242, 249 (1948)*; *Atlantic Coast Line R.R. Co. v. Clements, 184 Va. 656, 667–68, 36 S.E.2d 553, 558 (1946).*

### PRACTICE COMMENTARY

The instruction sets forth the common law duty of a railroad to place warning devices at a crossing. The Supreme Court has held that statutory duties are only the minimum precautions to be taken by a railroad, and that the duty of care to be exercised by the railroad is to be determined by the facts and circumstances of each case. *John F. Ivory Storage Co., 187 Va. at 870, 48 S.E.2d at 249.*

See Practice Commentary to Instruction No. 18.160 concerning when this state law duty is preempted.

See the Scope Note for circumstances under which a private crossing may gain the attributes of a public crossing under Virginia law; this instruction may then be given in a case involving an accident at such a private crossing. The Supreme Court has held that there is no duty of care to place warning devices not required by statute at a crossing if the crossing is not "unusually dangerous" or "extra-hazardous." *Bangley, 195 Va. at 346–47, 78 S.E.2d at 700*; *Clements, 184 Va. at 667–68, 36 S.E.2d at 557–58.* Accordingly, under the facts of each case it must be determined whether the instruction should be modified to require that the crossing be unusually dangerous or extra-hazardous, or whether the court should find this as a matter of law.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.190
## Railroad's Duty to Remove Trees and Brush From Right-of-Way

**A railroad has a duty to clear its right-of-way of any trees or brush that obstruct the view of an approaching train for one hundred feet on either side of the crossing.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-411.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

A claim for obstructing sightlines due to an overgrowth of vegetation is not preempted under 49 C.F.R. § 213.37 where the vegetation is not "on or immediately adjacent to the roadbed," and Va. Code Ann. § 56-411 applies. See *Anderson v. Wis. Cent. Transp. Co., 327 F. Supp. 2d 969, 980 (E.D. Wisc. 2004).*

### *ALERTS:*

- This statutory duty exists only at grade crossings at public roads. Va. Code Ann. § 56-411.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.191
## Railroad's Duty to Remove Vegetation Obstructing Sightlines

**A railroad has a duty to control vegetation in its property on or immediately adjacent to the roadbed so that it does not obstruct visibility of railroad signs and signals along the right-of-way and at public crossings.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING AUTHORITY:** 49 C.F.R. § 213.37.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Because 49 C.F.R. § 213.37 addresses the obstruction of sightlines due specifically to an overgrowth of vegetation "on or immediately adjacent to the roadbed," claims based on such vegetation are preempted, whereas claims for obstruction of sightlines due to vegetation that is not "on or immediately adjacent to the roadbed" are not preempted and Va. Code Ann. § 56-411 applies.

### *ALERTS:*

- None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.192
## Railroad's Duty to Clear Obstructions from Sightlines

**A railroad has a duty to remove or warn about any object, whether structural or natural, that is within the railroad's right-of-way and that obstructs the clear sightlines at a crossing** [of railroad signs or signals; of or from an approaching train].

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-411.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

A claim for obstructing sightlines due to an overgrowth of vegetation is not preempted under 49 C.F.R. § 213.37 where the vegetation is not "on or immediately adjacent to the roadbed," and Va. Code Ann. § 56-411 applies. See *Anderson v. Wis. Cent. Transp. Co., 327 F. Supp. 2d 969, 980 (E.D. Wisc. 2004).*

### *ALERTS:*

- This statutory duty exists only at grade crossings at public roads. Va. Code Ann. § 56-411.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

## Instruction No. 18.200
## Railroad's Duty to Keep Crossings in Repair

**A railroad has a duty to keep its crossings smooth and in good repair to the full width of the road, and to keep the road in good repair for two feet on either side of the outside rails so as to permit reasonable and safe travel on the highway.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-405.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The "full width" of the road is that portion of the road designed to be used by persons traveling the road. It does not include ditches or shoulders. *Norfolk & W. Ry. Co. v. Faris, 156 Va. 205, 219, 157 S.E. 819, 824 (1931).*

### *ALERTS:*

- This statutory duty exists only at grade crossings at public roads.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101; 119 through 142

# Chapter 19

# RAILROADS—RIGHT-OF-WAY

**Scope Note**

**Instruction No. 19.000 Railroad's Duty: Persons on Its Property**

**Instruction No. 19.010 Railroad's Duty: Identification of Object on Tracks**

**Instruction No. 19.020 Railroad's Duty: Anticipated Trespassers on Tracks**

# SCOPE NOTE

These instructions cover a railroad's duties toward persons on railroad property. For the duties of a railroad for fires started by its trains and toward employees of consignees of its freight cars, see Chapter 20, Railroads—Miscellaneous. The duties of railroads, drivers, and passengers at grade crossings are covered in Chapter 18, Railroads—Crossings.

The instructions in this chapter are differentiated by the railroad's state of knowledge. Instruction No. 19.000 concerns the case where the railroad's employee has actual knowledge of the presence of a person on the railroad's property. Instruction No. 19.010 concerns the situation where the employee sees an object on the tracks and discovers or should have discovered that it was a person. Note that once the employee observes an object on the tracks, he has a duty to observe the object until he can identify it. The case in which the employee should reasonably have expected a person to be on or around the tracks is covered by Instruction No. 19.020.

All three instructions apply even where the person on the right-of-way is a trespasser. Trespasser is defined in Instruction No. 23.000. Note that the duty a railroad owes to people on its tracks differs from the duty owed to trespassers by other occupants of property. For the traditional standard, see Instruction No. 23.090, Occupant's Duty to Trespassers—Condition of Premises. Instructions on the duty of occupants of property towards others generally can be found in Chapter 23, Owners and Occupants.

## Instruction No. 19.000
## Railroad's Duty: Persons on Its Property

**A railroad has a duty to use ordinary care to avoid injuring anyone who its employees knew, or should have known, was on the railroad's property and who they knew, or should have known, was in danger.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk S. Ry. Co. v. Fincham, 213 Va. 122, 126, 189 S.E.2d 380, 383 (1972)*; *Tiller v. Norfolk & W. Ry. Co., 190 Va. 605, 610, 58 S.E.2d 45, 47 (1950).*

### PRACTICE COMMENTARY

This instruction applies even though the plaintiff was a trespasser at the time of the accident. If railroad employees have either actual knowledge of danger to a trespasser, or notice which would alert a reasonable person to the danger, they must use ordinary care to avoid harming him. *Fincham, 213 Va. at 126, 189 S.E.2d at 383; Tiller, 190 Va. at 610, 58 S.E.2d at 47.* Thus, a railroad's duty to a trespasser differs from the traditional duty of an occupier of property, who is required only to "refrain from intentionally or willfully injuring" a trespasser. Instruction No. 23.090, Occupant's Duty to Trespasser and Bare Licensee: Condition of Premises.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 5.2, 16.2

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101

## Instruction No. 19.010
## Railroad's Duty: Identification of Object on Tracks

**If an employee of a railroad sees an object on the tracks, then he has a duty to keep a lookout until he identifies the object. As soon as he knows, or should have known, that the object is a person, the railroad has a duty to use ordinary care to avoid harming him. If the person is in obvious and immediate danger, then the railroad has a duty to use all available means, consistent with the safety of those on the train, to avoid harming him.**

**If the railroad fails to perform one or more of these duties, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Turner v. Norfolk S. Ry. Co., 205 Va. 691, 694, 139 S.E.2d 68, 70–71 (1964)*; *Washington & Old Dominion R.R. v. Taylor, 188 Va. 458, 465–66, 472, 50 S.E.2d 415, 419, 422 (1948).*

### PRACTICE COMMENTARY

This instruction applies even though plaintiff was a trespasser at the time of the accident. *Turner, 205 Va. at 694, 139 S.E.2d at 70–71.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 5.2, 16.2

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101

## Instruction No. 19.020
## Railroad's Duty: Anticipated Trespassers on Tracks

**A railroad has a duty to use ordinary care to look for persons whom it might reasonably expect to be using the** [section of tracks; area alongside the tracks] **where the accident occurred as a walkway. If the railroad discovers, or should have discovered, a person in danger, then the railroad has a duty to use ordinary care to avoid harming him. If the person is in obvious and immediate danger, then the railroad has a duty to use all available means, consistent with the safety of those on the train, to avoid harming him.**

**If the railroad fails to perform one or more of these duties, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Turner v. Norfolk S. Ry. Co., 205 Va. 691, 693–94, 139 S.E.2d 68, 70–71 (1964)*; *Washington & Old Dominion R.R. v. Taylor, 188 Va. 458, 468–70, 50 S.E.2d 415, 420–21 (1948).*

### PRACTICE COMMENTARY

This instruction applies even though the plaintiff was a trespasser at the time of the accident. *Turner, 205 Va. at 694, 139 S.E.2d at 70–71.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 5.2, 16.2

MICHIE'S JURISPRUDENCE Railroads §§ 46 through 101

# Chapter 20

# RAILROADS—MISCELLANEOUS

**Scope Note**

**Instruction No. 20.000** **Duty of Initial Carrier to Employee of Consignee**

**Instruction No. 20.005** **Duty of a Delivering Carrier to Employee of Consignee**

**Instruction No. 20.010** **Railroad's Liability for Fires Started by Train**

# SCOPE NOTE

These instructions cover the liability of a railroad in cases involving fires started by trains, and in cases involving an injury to the employee of a consignee where the railroad was the initial and delivering carrier. The duties of railroads, drivers, and passengers at grade crossings are covered in Chapter 18, Railroads—Crossings. The duties of a railroad to persons on its tracks are covered in Chapter 19, Railroads—Right-of-Way.

"The duty of railroad carriers to inspect varies as their relation to the instrument which causes the injury varies, depending on whether the carrier sought to be held responsible is the initial, the intermediate, or the delivering carrier." *Veale v. Norfolk & Western Ry. Co., 205 Va. 822, 826–27, 139 S.E.2d 797, 799 (1965).*

Instruction No. 20.000 concerns the duty of a railroad as initial carrier to furnish cars which can be unloaded with reasonable safety by the employees of consignees. The case on which this instruction is based appears to be the first case of this sort in Virginia.

Instruction No. 20.005 concerns the duty of a railroad as a delivering carrier to use ordinary care to inspect the car to discover any noticeable defect in the car's construction or state of repair and a duty to repair or give warning of such dangerous conditions. This duty is owed to employees of the consignee who are responsible for unloading the freight car.

Instruction No. 20.010 covers a railroad's liability for fires started by sparks from its trains, as imposed by Va. Code Ann. § 56-428. Note that the fire does not have to start on the railroad's right-of-way.

## Instruction No. 20.000
## Duty of Initial Carrier to Employee of Consignee

**A railroad that is the initial carrier owes a duty to an employee of the company who unloads a freight car to use ordinary care to furnish a freight car that can be unloaded with reasonable safety.**

**If a railroad fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & Western Ry. Co. v. Baker, 226 Va. 527, 531–32, 311 S.E.2d 766, 768 (1984); Norfolk & Western Ry. Co. v. Chrisman, 219 Va. 184, 188, 247 S.E.2d 457, 459 (1978).*

### PRACTICE COMMENTARY

The decision in *Chrisman* appears to be the first instance in which the court has recognized the liability of initial and delivering carriers.

### *ALERTS:*

- An intermediate carrier owes no duty to inspect a car to see whether it is safe for unloading. *Veale v. Norfolk & Western Ry. Co., 205 Va. 822, 825–26, 139 S.E.2d 797, 799–800 (1965).*

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101

## Instruction No. 20.005
## Duty of a Delivering Carrier to Employee of Consignee

**A railroad that is the delivering carrier owes a duty to an employee of the company who unloads the freight car to use ordinary care to inspect the freight car to see if it is reasonably safe to be unloaded, and a duty to repair or give warning of any dangerous condition discoverable by the inspection.**

**If the railroad fails to perform either of these duties, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Norfolk & Western Ry. Co. v. Baker, 226 Va. 527, 531–32, 311 S.E.2d 766, 768 (1984)*; *Norfolk & Western Ry. Co. v. Chrisman, 219 Va. 184, 188, 247 S.E.2d 457, 459 (1978).*

### PRACTICE COMMENTARY

The decision in *Chrisman* appears to be the first instance in which the court has recognized the liability of a delivering carrier.

"The required inspection should [be] sufficiently thorough to determine whether there was any fairly obvious defect in [the car's] construction or state of repair which constitute[d] a likely source of danger." *Chrisman, 219 Va. at 188, 247 S.E.2d at 459.*

### *ALERTS:*

- An intermediate carrier owes no duty to inspect a car to see whether it is safe for unloading. *Veale v. Norfolk & Western Ry. Co., 205 Va. 822, 825–26, 139 S.E.2d 797, 799–800 (1965).*

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101.

## Instruction No. 20.010
## Railroad's Liability for Fires Started by Train

**If you find by the greater weight of the evidence that plaintiff was damaged by a fire that was started by** [a spark; coal; (name of other incendiary item)] **from defendant's** [engine; train], **then you must find for the plaintiff.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 56-428.

**CASE AUTHORITY:** *Peck Iron & Metal Co. v. Seaboard Air Line R.R. Co., 200 Va. 698, 699–700, 107 S.E.2d 421, 422–23 (1959).*

### PRACTICE COMMENTARY

Under the applicable statute, "the negligence of the railroad company is not an essential ingredient and the plaintiff need only prove by a preponderance of the evidence that the fire was caused by sparks or coals emitted or thrown by the defendant's engine. That fact the plaintiff may prove by direct or circumstantial evidence." *Peck Iron & Metal Co., 200 Va. at 700, 107 S.E.2d at 423.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Railroads §§ 46 through 101

# Chapter 21

# RAILROADS—FEDERAL EMPLOYERS' LIABILITY ACT

## Scope Note

**Instruction No. 21.000** Railroad's General Duty of Care

**Instruction No. 21.001** Degree of Care Varies With Risk Level

**Instruction No. 21.010** Causation

**Instruction No. 21.015** Aggravation of Pre-Existing Condition

**Instruction No. 21.020** Employee's Duty of Care

**Instruction No. 21.030** Contributory Negligence: Damages Diminished

**Instruction No. 21.040** Violation of Federal Railroad Safety Authorization Act or Other Statute or Regulation Enacted for Safety of Employees

**Instruction No. 21.050** Finding Instruction

**Instruction No. 21.060** Present Value

# SCOPE NOTE

The Federal Employers' Liability Act ("FELA") imposes liability on a railroad common carrier when one of its employees is injured or killed by the negligence of another employee or an officer or agent of the railroad or by any negligently caused defect or insufficiency in the railroad's equipment. 45 U.S.C. § 51. It is similar to a Workers' Compensation program for railroad employees, but instead of paying pursuant to a pre-determined benefits schedule, it allows damages awards for pain and suffering to be determined by juries based on comparative negligence. The injured employee or his estate is entitled to collect a claim if there is evidence the injury was caused, "in whole or in part," by the railroad's negligence.

Although a FELA suit is an action to recover for personal injuries, it is different from a negligence suit. The two most basic elements of a FELA cause of action are "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury." *Norfolk S. Ry. v. Sorrell, 549 U.S. 158, 169 (2007).* However, the statutory language describing the element of causation—"resulting in whole or in part from the negligence" of the railroad—reflects a departure from common law proximate causation. *CSX Transp. v. McBride, 564 U.S. 685 (2011)*; *Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957).* Therefore, proximate cause as normally understood in Virginia negligence law has no place in a FELA suit, and FELA's relaxed causation standard is used instead. *Norfolk S. Ry. Co. v. Sumner, 297 Va. 35, 42 (2019).* This aspect is covered in Instruction No. 21.010, Causation.

The elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell, 549 U.S. at 165–66.* For example, express language in FELA abrogates the common-law tort defenses of assumption of the risk, contributory negligence, the fellow-servant rule, and exemption from the Act through contract, see 45 U.S.C. §§ 51, 53–55. *CONRAIL v. Gottshall, 512 U.S. 532, 542–43 (1994).*

Suits under the Act can be brought in either state or federal court. 45 U.S.C. § 56. The decision whether to sue in state or federal court is solely the injured employee's or his estate's; FELA actions brought in state court are not removable by the railroad. 28 U.S.C. § 1445(a). Even when the suit is in state court, the substantive law is federal, but FELA actions brought in state court are subject to the state's procedural rules. *Cole v. Norfolk S. Ry. Co., 294 Va. 92, 97, 803 S.E.2d 346, 349 (2017); Roberts v. CSX Transp., Inc., 279 Va. 111, 119–20, 688 S.E.2d 178, 183 (2010)*; *St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985).*

In a suit brought solely under 45 U.S.C. § 51, the employee must prove that the railroad negligently failed to provide him with a safe place to work. See, e.g., *Bailey v. Central Vermont Ry., 319 U.S. 350, 352 (1943).* Instruction No. 21.000, Railroad's General Duty of Care, covers the case where an employee brings an action only under 45 U.S.C. § 51.

The employee could traditionally make a claim that the railroad had also violated the Federal Safety Appliance Act (F.S.A.A. or S.A.A.), 45 U.S.C. §§ 1–22, or the Federal Boiler Inspection Act (F.B.I.A.), 45 U.S.C. §§ 23–43. Those acts were repealed in 1994 but substantively readopted in the Federal Railroad Safety Authorization Act of 1994 (F.R.S.A.A.), 49 U.S.C. § 20101 et seq. (The S.A.A. has been recodified as 49 U.S.C.

§ 20301, et seq., and the F.B.I.A., also known as the Locomotive Inspection Act, the Locomotive Boiler Inspection Act and the Boiler Inspection Act, has been recodified as 49 U.S.C. § 20701 et seq.) Instruction No. 21.040, Federal Railroad Safety Authorization Act Violation, should be used in those cases. It is important to note that many post-1994 cases still refer to the F.S.A.A. instead of to the F.R.S.A.A. See *Deans v. CSX Transp., Inc., 216 F.3d 398, 399 (4th Cir. 2000)*; *Nash v. Norfolk & W. Ry., 93 F. Supp. 2d 703, 704 (W.D. Va. 2000).*

In a case involving an alleged violation of the Safety Appliance Act, the Boiler Inspection Act, or the Federal Rail Safety Act, or some relevant safety regulation, all the plaintiff must prove is that the railroad's violation of the act or regulation caused the employee's injuries or death. Proof of a violation proves negligence, and no further negligence determination is necessary on the statutory or regulatory claim. *Rogers, 352 U.S. at 507.* This distinction is set out in Instruction No. 21.050, Finding Instruction. The causation standard to be applied in these cases is the same as that used in FELA cases. *Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 434(1949).*

The Act significantly alters the defenses available to a railroad. First, the doctrine of assumption of the risk is eliminated as a defense in every FELA action whether or not an F.R.S.A.A. violation is asserted. 45 U.S.C. § 54; *Norfolk & W. Ry. Co. v. Hodges, 248 Va. 254, 263, 448 S.E.2d 592, 597 (1994); Sabb v. Norfolk & Portsmouth Belt Line R.R. Co., 222 Va. 19, 22, 278 S.E.2d 795, 797 (1981)*; *Norfolk S. Ry. Co. v. Rayburn, 213 Va. 812, 816, 195 S.E.2d 860, 864 (1973)*; *Bly v. Southern Ry. Co., 183 Va. 162, 168, 31 S.E.2d 564, 567 (1944), aff'd on reh'g, 183 Va. 406, 406–07, 32 S.E.2d 659, 659 (1945)*; *Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 58 (1943).* Second, in a FELA case, any contributory negligence of the railroad's employee is not a bar to recovery; instead, comparative negligence is applied to diminish the employee's recovery. 45 U.S.C. § 53; *Cole v. Norfolk S. Ry. Co., 294 Va. 92, 98, 803 S.E.2d 346, 349 (2017); Sabb, 222 Va. at 22, 278 S.E.2d at 797.* Instruction No. 21.020, Employee's Duty of Care, states the employee's duty, when he does not allege an F.R.S.A.A. violation, to use ordinary care for his own safety. Instruction No. 21.030, Contributory Negligence: Damages Diminished, should be used in conjunction with Instruction No. 21.020. Note that a sole proximate cause instruction is inappropriate here because the plaintiff's contributory negligence diminishes his recovery but does not preclude it. If the railroad violated any statute enacted for the safety of its employees, such as the F.R.S.A.A., and if the violation contributed to the injury or death of any employee, contributory negligence is not a defense, not even to the extent of diminishing recovery. 45 U.S.C. §§ 53, 54a.

A FELA suit can be difficult to prepare instructions for if both straight FELA and F.R.S.A.A. claims are combined because negligence and contributory (i.e., comparative) negligence are germane to the former and not to the latter. The Committee recommends that the jury be instructed to consider the F.R.S.A.A. claims first. If the jury believes that a safety act violation played a part, however small, in the plaintiff's injuries, then he is entitled to recover the full amount of his damage. If the jury does not find a safety act violation, it should consider whether the railroad was negligent, and, if so, whether this negligence played a part, however small, in the plaintiff's injuries. If so, the plaintiff is entitled to recover the amount of his damages diminished in proportion to his negligence, if any, proven by the defendant. Instruction No. 21.050 provides a starting point for drafting the necessary instructions.

An instruction on present value must be given, if requested, when future damages are of issue in the case. See Instruction No. 21.060.

Finally, although this is not a matter directly affecting any jury instruction, the United States Supreme Court has said often and pointedly that the question of the sufficiency of the evidence is a federal question and that far less evidence is required to take a FELA case to the jury than is necessary for a state-based claim. *Davis v. Virginian Ry. Co., 361 U.S. 354, 356–57 (1960).* It is instructive to compare the earlier state and federal FELA decisions with those decided after *Rogers, 352 U.S. at 510,* and *Davis, 361 U.S. at 354.* These later cases clearly recognize the admonition in *Rogers* to allow the jury to make the decision on questions of negligence. Compare *Norfolk & W. Ry. Co. v. Keatley, 211 Va. 507, 510, 178 S.E.2d 516, 518 (1971),* with *Going v. Norfolk & W. Ry. Co., 119 Va. 543, 562–63, 89 S.E. 914, 919, 920 (1916), aff'd, 248 U.S. 538 (1918).*

## Instruction No. 21.000
## Railroad's General Duty of Care

**A railroad has a duty to use ordinary care to provide its employees with a safe place in which to work and safe equipment with which to do the work. Ordinary care is the care a reasonable person would have used under the circumstances.**

**The railroad's duty of care is measured by what is reasonably foreseeable under like circumstances. It is not required to have anticipated or foreseen the precise** [injury; damage] **that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some** [injury; damage] **might probably result from the negligent act.**

**If a railroad fails to perform this duty, then it is negligent.**

## Sources & Authority

**Governing Statutes:** 45 U.S.C. § 51.

**Case Authority:** *CSX Transp., Inc. v. McBride, 564 U.S. 685, 688, 703–04 (2011)*; *Norfolk S. Ry. Co. v. Rogers, 270 Va. 468, 480, 621 S.E.2d 59, 66 (2005)*; *Norfolk & W. Ry. Co. v. Keeling, 265 Va. 228, 232, 576 S.E.2d 452, 455–56 (2003)*; *Norfolk S. Ry. Co. v. Bowles, 261 Va. 21, 26, 539 S.E.2d 727, 729–30 (2001)*; *Norfolk S. Ry. Co. v. Trimiew, 253 Va. 22, 24, 480 S.E.2d 104, 106 (1997)*; *Norfolk & W. Ry. Co. v. Johnson, 251 Va. 37, 44, 465 S.E.2d 800, 805 (1996)*; *Norfolk & W. Ry. Co. v. Hodges, 248 Va. 254, 260–61, 448 S.E.2d 592, 596 (1994)*; *Sabb v. Norfolk & Portsmouth Belt Line R.R. Co., 222 Va. 19, 23, 278 S.E.2d 795, 798 (1981)*; *Norfolk S. Ry. Co. v. Rayburn, 213 Va. 812, 817, 195 S.E.2d 860, 865 (1973)*; *Bly v. Southern Ry. Co., 183 Va. 162, 170, 31 S.E.2d 564, 567–68 (1944), aff'd on reh'g, 183 Va. 406, 32 S.E.2d 659 (1945)*; *Chesapeake & Ohio Ry. Co. v. Butler, 163 Va. 626, 634, 177 S.E. 195, 197–98 (1934).*

## Practice Commentary

A railroad has a duty to assign employees to work for which they are suited; this duty is breached if the railroad knew, or should have known, that an assignment exposed an employee to an unreasonable risk of harm. *Sabb, 222 Va. at 23, 278 S.E.2d at 798.*

The principle of reasonable foreseeability of harm is an essential element of negligence under FELA, but it is only relevant for purposes of determining the measure of duty and is not applicable to the determination of causation. *McBride, 564 U.S. at 703–04.*

## *ALERTS:*

- A FELA action must commence within three years from the day the cause of action accrued. 45 U.S.C. § 56.

- This instruction must not be used if the case involves only a violation of the Federal Railroad Safety Authorization Act, 49 U.S.C. § 20101 et seq. A violation of that Act creates liability even if the railroad used ordinary care. Use Instruction No. 21.040, Federal Railroad Safety Authorization Act Violation, instead. If both FELA and F.R.S.A.A. claims exist in the same case, you will need to use both instructions and, on the FELA claim, the contributory negligence and diminished damages instructions, Nos. 21.020 and 21.030, as well. See the Scope Note and Instruction No. 21.050, Finding Instruction, for guidance in drafting the instructions.

- This instruction applies only where the defendant is a railroad common carrier engaged in interstate commerce. Whether the defendant is engaged in interstate commerce is a question of law for the court to decide.

## Instruction No. 21.001
## Degree of Care Varies With Risk Level

**The degree of care required by the reasonable care standard varies with the level of risk. The greater the risk of harm, the greater the required level of care.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Norfolk & W. Ry. v. Hodges, 248 Va. 254, 260, 448 S.E.2d 592, 596 (1994); Blair v. Baltimore & O. R. Co., 323 U.S. 600, 604 (1945); Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67 (1943); Urie v. Thompson, 337 U.S. 163, 179 (1949).*

## Instruction No. 21.010
## Causation

**A railroad has caused or contributed to the employee's** [injury; death] **if the railroad's negligence played a part—no matter how small—in bringing about the** [injury; death]**. The mere fact that** [an injury; a death] **occurred does not necessarily mean that the** [injury; death] **was caused by negligence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** 45 U.S.C. § 51.

**CASE AUTHORITY:** *Norfolk S. Ry. Co. v. Sumner, 297 Va. 35, 822 S.E.2d 809 (2019); Omega Protein, Inc. v. Forrest, 284 Va. 432, 439–40, 732 S.E.2d 708, 712 (2012); CSX Transp., Inc. v. McBride, 564 U.S. 685 (2011); Norfolk S. Ry. Co. v. Rogers, 270 Va. 468, 480–81, 621 S.E.2d 59, 66 (2005); Norfolk S. Ry. Co. v. Trimiew, 253 Va. 22, 24, 480 S.E.2d 104, 106 (1997); Norfolk & W. Ry. Co. v. Chittum, 251 Va. 408, 415, 468 S.E.2d 877, 881 (1996); Norfolk & W. Ry. Co. v. Johnson, 251 Va. 37, 43–44, 465 S.E.2d 800, 805 (1996); Stover v. Norfolk & W. Ry. Co., 249 Va. 192, 199, 455 S.E.2d 238, 242 (1995); Norfolk & W. Ry. Co. v. Hodges, 248 Va. 254, 260, 448 S.E.2d 592, 595–96 (1994); Norfolk & W. Ry. Co. v. Hughes, 247 Va. 113, 115–16, 439 S.E.2d 411, 413 (1994); Sabb v. Norfolk & Portsmouth Belt Line R.R., 222 Va. 19, 22, 278 S.E.2d 795, 797 (1981); Rogers v. Missouri P. R.R. Co., 352 U.S. 500, 506–10 (1957).*

### PRACTICE COMMENTARY

In *Rogers*, the United States Supreme Court described FELA's relaxed causation standard as whether "employer negligence played any part, even the slightest, in providing the injury or death for which damages are sought." *352 U.S. at 506*. In *McBride*, the Court affirmed the language used in Instruction No. 21.010, rejecting the railroad's objection to the failure to instruct on proximate cause. The Court noted that FELA's language on causation "is as broad as could be framed." *564 U.S. at 691, 705*.

More recently, the Virginia Supreme Court in *Sumner*, in examining the evidence in light of FELA's relaxed causation standard, found "There was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall which was the source of the plaintiff's injury. The evidence may also have been sufficient to support an inference that the plaintiff's fall resulted from causes unrelated to the defendant's negligence. Under the settled principles governing FELA cases, that juxtaposition created a jury issue as to which inference should be drawn." *297 Va. at 46–47, 822 S.E.2d at 815*. However, the dissent noted that "the plaintiff's evidence failed to establish the foundational 'but for' causation that is required to establish the railroad's liability. Although the FELA has diluted the standard for *proximate* causation, a plaintiff must still prove 'but for' causation." *Id. at 47, 822 S.E.2d at 815*.

In *Omega Protein, Inc., 284 Va. at 439–40, 732 S.E.2d at 712–13*, the Court discussed FELA causation in a Jones Act case.

### *ALERTS:*

- Under FELA, a railroad is liable if its negligence played even the slightest part in producing the injury to the employee. *Trimiew, 253 Va. at 24, 480 S.E.2d at 106*; *Hughes, 247 Va. at 115–116, 439 S.E.2d at 413*. The principle of reasonable foreseeability of harm is an essential element of negligence under FELA, but it is only relevant for purposes of determining the measure of duty and is not applicable

to the determination of causation. *McBride, 564 U.S. at 703.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

## Instruction No. 21.015
## Aggravation of Pre-Existing Condition

**You have received evidence of** (describe plaintiff's pre-existing condition).

**The railroad is liable to the plaintiff only for damages you find to be caused by the railroad's negligence.**

**If you find that the plaintiff's pre-existing condition made him more susceptible to injury than a person in good health, the railroad is responsible for all injuries suffered by the plaintiff as a result of its negligence, even if those injuries are greater than those a person in good health would have suffered under the same circumstances.**

**If you find that the railroad negligently caused further injury or aggravation to the plaintiff's pre-existing condition, the plaintiff is entitled to compensation for all of his damages caused by the incident, including the further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by the incident, then the railroad is liable for all of the plaintiff's injuries.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Stevens v. Bangor & Aroostook R.R., 97 F.3d 594, 601 (1st Cir. 1996).*

## Instruction No. 21.020
## Employee's Duty of Care

**An employee has a duty to use ordinary care for his own safety at the time and place in question.**

**If an employee fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** 45 U.S.C. § 53.

**CASE AUTHORITY:** *Norfolk S. Ry. Co. v. Thomas, 258 Va. 516, 521, 522 S.E.2d 620, 623 (1999)*; *Sabb v. Norfolk & Portsmouth Belt Line R.R. Co., 222 Va. 19, 22, 278 S.E.2d 795, 797 (1981)*; *Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 66–67 (1943)*; *Chesapeake & Ohio R. R. Co. v. Arrington, 126 Va. 194, 213–14, 101 S.E. 415, 422 (1919).*

### PRACTICE COMMENTARY

A railroad has a duty to assign employees to work for which they are suited; this duty is breached if the railroad knew or should have known that an assignment exposed an employee to an unreasonable risk of harm. *Sabb, 222 Va. at 23, 278 S.E.2d at 798.* Note also the discussion in *Sabb* of other cases in which an employee protested an assignment but then completed it after an admonition from a supervisor. *Id. at 23–24, 278 S.E. at 798.*

### *ALERTS:*

- Contributory negligence does not bar recovery. In an action brought under FELA, contributory negligence diminishes the employee's damages in proportion to the amount of negligence attributable to such employee unless a violation of a federal safety statute contributes to the death or injury. If liability is premised on a violation of the Federal Railroad Safety Authorization Act, contributory negligence is not a bar to recovery and does not diminish damages. 45 U.S.C. §§ 53, 54a.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

## Instruction No. 21.030
## Contributory Negligence: Damages Diminished

**If you find that the railroad and the employee were both negligent, and that the negligence of each combined to cause the employee's** [injury; death]**, then the** [employee; employee's estate; employee's personal representative; employee's beneficiaries] [is; are] **entitled to recover, but you are required to diminish the damages in proportion to the amount of negligence attributable to the employee.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** 45 U.S.C. § 53.

**CASE AUTHORITY:** *Norfolk S. Ry. Co. v. Thomas, 258 Va. 516, 521, 522 S.E.2d 620, 623 (1999)*; *Norfolk & W. Ry. Co. v. Hodges, 248 Va. 254, 262, 448 S.E.2d 592, 596 (1994)*; *Norfolk S. Ry. Co. v. Rayburn, 213 Va. 812, 816, 195 S.E.2d 860, 864 (1973)*; *Washington & Old Dominion Ry. v. Warner, 124 Va. 452, 459, 97 S.E. 799, 801–02 (1919)*; *Chesapeake & Ohio Ry. Co. v. Meadows, 119 Va. 33, 53–54, 89 S.E. 244, 250 (1916)*; *Seaboard A. L. Ry. v. Tilghman, 237 U.S. 499 (1915).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- It is reversible error to instruct the jury to deduct "a reasonable amount" from the damages for contributory negligence. The jury must be instructed to use the proportional damage rule set forth in 45 U.S.C. § 53. *Tilghman, 237 U.S. at 501–02.*

- If the employer violates a safety statute such as the Federal Railroad Safety Authorization Act, 49 U.S.C. § 20101 et seq., the defense of contributory negligence is not available to him. *Grand Trunk W. Ry. Co. v. Lindsay, 233 U.S. 42, 49–50 (1914).*

- The defense of assumption of the risk has been abolished in FELA cases. 45 U.S.C. § 54. For a comparison of contributory negligence and assumption of the risk, see *Thomas, 258 Va. at 521–22, 522 S.E.2d at 624; Hodges, 248 Va. at 263, 448 S.E.2d at 597; Rayburn, 213 Va. at 816, 195 S.E.2d at 864.* It is reversible error to give an instruction that assumption of the risk is not a defense, absent allegation or proof on the question. *Norfolk & W. Ry. Co. v. Sonney, 236 Va. 482, 490–91, 374 S.E.2d 71, 75–76 (1988).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

## Instruction No. 21.040
## Violation of Federal Railroad Safety Authorization Act or Other Statute or Regulation Enacted for Safety of Employees

**A railroad is liable to an employee if his** [injuries were; death was] **caused in whole or in part by** (describe violation of Federal Railroad Safety Authorization Act or other statute or regulation enacted for the safety of employees)**. The violation caused or contributed to the injury if the violation played a part—no matter how small—in bringing about the employee's** [injury; death]**. The employee's negligence, if any, is not a defense to any damages caused in whole or in part by the violation of a** [statute; regulation] **enacted for the safety of employees.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** 49 U.S.C. § 20101 et seq.; 45 U.S.C. § 53.

**CASE AUTHORITY:** There are numerous cases cited in the annotations to 45 U.S.C. § 53.

### PRACTICE COMMENTARY

The F.S.A.A. and the F.B.I.A. were repealed in 1994 but substantively readopted in the F.R.S.A.A. See 49 U.S.C. § 20101 et seq.

Many post-1994 cases continue to refer to the F.S.A.A. instead of to the F.R.S.A.A. See *Deans v. CSX Transp., Inc., 216 F.3d 398, 399 (4th Cir. 2000)*; *Nash v. Norfolk & W. Ry. Co., 93 F. Supp. 2d 703, 704 (W.D. Va. 2000)*. As explained in the Scope Note of this chapter, the causation standard to be applied in F.R.S.A.A. cases is the same as that used in FELA cases. *Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430, 434 (1949)*.

### *ALERTS:*

- When both FELA and F.R.S.A.A. claims are joined in one suit, the jury must be instructed that the employee's negligence diminishes any recovery under FELA but is irrelevant to any recovery under the F.R.S.A.A. See Instruction No. 21.050, Finding Instruction.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

**Instruction No. 21.050**
**Finding Instruction**

**The plaintiff makes two kinds of claims in this case: a** [statutory; regulatory] **claim based on** (insert cite to applicable statute or regulation) **and a negligence claim. The rules of law that apply to those two claims are different; this instruction will tell you the rules to apply.**

**You shall find your verdict for the plaintiff on his claim based on** (insert cite to applicable statute or regulation) **if he proved by the greater weight of the evidence:**

(1) **that the defendant violated a statute enacted for the safety of employees; and**

(2) **that the violation caused or contributed to the** [injury; death] **by playing a part—no matter how small—in bringing about the** [injury; death].

**If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the claim based on** (insert cite to applicable statute or regulation), **but you must consider the remainder of this instruction.**

**You shall find your verdict for the plaintiff on his negligence claim if he proved by the greater weight of the evidence:**

(1) **that the defendant was negligent; and**

(2) **that the negligence caused or contributed to the** [injury; death] **by playing a part—no matter how small—in bringing about the** [injury; death].

**If the plaintiff failed to prove either or both of the two elements above, then you shall find for the defendant on the negligence claim, but you must consider the remainder of this instruction.**

**If you find your verdict for the plaintiff on both the claim based on** (insert cite to applicable statute or regulation) **and the negligence claim, or on the** [statutory; regulatory] **claim mentioned above alone, then you shall proceed to determine his damages according to the other instructions the court will give you. The negligence, if any, of the plaintiff does not bar him from recovering, nor does it diminish his damages.**

**If you find your verdict for the plaintiff based only on the negligence claim, and if the defendant proves by the greater weight of the evidence that the plaintiff was contributorily negligent, then you shall reduce the amount of the verdict in proportion to the relative negligence of the plaintiff and defendant.**

**If the plaintiff fails to prove either the negligence or the statutory claim, then you shall find your verdict for the defendant.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See 45 U.S.C. §§ 51–54a

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Sonney, 236 Va. 482, 490–91, 374 S.E.2d 71, 75–76 (1988).*

### PRACTICE COMMENTARY

Although an issue-and-allocation-of-the-burdens-of-proof instruction is not included in this chapter, you can adapt Instruction No. 3.000, Issues and Allocation of Burdens of Proof, and use it with Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence.

The United States Supreme Court has held that evidence must be admitted to show the effect of income taxes on the decedent's future earnings and that the jury may be instructed that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 492, 498 (1980).*

Failure to include a reference to contributory negligence in a finding instruction, even though covered by other instructions, is prejudicial error. *Sonney, 236 Va. at 490, 374 S.E.2d at 75.*

☞ ***PRACTICE POINTER:*** For another instruction on comparative negligence, see Instruction No. 18.090.

### ***ALERTS:***

- This instruction is drafted to be applicable in a case involving both safety act and safe place to work claims. If a case involves only one type of claim, inapplicable references should be deleted.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

**Instruction No. 21.060**
**Present Value**

**If you find in favor of the plaintiff and make an award for any loss of earnings or expense in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that the plaintiff will have use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *CSX Transp., Inc. v. Casale, 247 Va. 180, 184–85, 441 S.E.2d 212, 214–15 (1994); St. Louis S. R. Co. v. Dickerson, 470 U.S. 409, 411–12 (1985).*

### PRACTICE COMMENTARY

Federal substantive law governs FELA cases. It is reversible error to refuse to grant an instruction regarding present value if future damages are of issue in the case. *Casale, 247 Va. at 184, 441 S.E.2d at 214–15.*

A defendant seeking a reduction to present value of a sum awarded for future lost wages has the burden of going forward with the evidence on that issue. *Casale, 247 Va. at 186, 441 S.E.2d at 216.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 24

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.06

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.5

Kent Sinclair, VIRGINIA REMEDIES §§ 18-1 through 18-6

MICHIE'S JURISPRUDENCE, Master and Servant §§ 81 through 94

# Chapter 22

# COMMON CARRIERS



## Scope Note

**Instruction No. 22.000** **Duty of Care Owed to Passengers Generally**

**Instruction No. 22.010** **Duty of Care Owed to Incapacitated Passengers**

**Instruction No. 22.020** **Duty to Protect Passengers From Assault by Employees**

**Instruction No. 22.030** **Duty to Protect Passengers From Assault by Other Passengers or Strangers**

**Instruction No. 22.040** **Authority to Eject Disorderly Persons**

**Instruction No. 22.050** **Inception of Passenger-Carrier Relationship**

**Instruction No. 22.060** **Termination of Passenger-Carrier Relationship**

# SCOPE NOTE

These instructions cover the liability of any sort of common carrier for injuries to its passengers. Taxicabs, buses, railroads, ferries, and elevators are common carriers. Rarely will there be an issue of whether the defendant is a common carrier; Instruction No. 22.000 assumes that it is not an issue. If it is an issue, the jury must be instructed appropriately.

Instruction No. 22.000 states that a common carrier owes to its passengers the highest degree of practical care. Instruction No. 22.010 describes the enhanced duty of care owed to passengers who are unable to care for their own safety.

Instruction No. 22.020 sets forth a common carrier's duty to protect its passengers from an unjustified assault by its employees. Instruction No. 22.030 deals with the duty to protect passengers from assaults by other passengers or strangers. Instruction No. 22.040 covers the carrier's authority to remove disorderly persons to preserve order on its conveyance.

Instruction No. 22.050 provides the test for determining the inception of the passenger-carrier relationship. Instruction No. 22.060 sets forth the test to determine when the passenger-carrier relationship terminates.

If there is a dispute whether the plaintiff is a passenger or not, the jury must be instructed on a carrier's duty to non-passengers. A common carrier must use ordinary care to those who are not passengers just as a non-carrier owes a duty to use ordinary care to those with whom it comes in contact.

If the plaintiff is injured in a carrier's facilities (e.g., depot, waiting room) before he becomes a passenger, the carrier's duty to him will be determined by reference to the instructions in the chapter on Owners and Occupants, Chapter 23.

Instructions on contributory negligence and assumption of the risk are found in Chapter 6. Although several cases have declared that a passenger assumes all risks incidental to the use of the conveyance and that he must prove that the jerks and jolts were unnecessary or were unusually sudden or violent, this is not technically an assumption of the risk problem. The plaintiff is merely required to prove that the defendant failed to exercise the highest degree of practical care.

There is no separate instruction on *res ipsa loquitur* or on presuming negligence. When the doctrine of res ipsa loquitur is applicable in this area, modify the general *res ipsa loquitur* instruction, Instruction No. 7.050, by replacing "ordinary care" with "highest degree of practical care and foresight."

## Instruction No. 22.000
## Duty of Care Owed to Passengers Generally

**The defendant is a common carrier. A common carrier has the duty to use the highest degree of practical care for the safety of its passengers. It is liable for the slightest negligence causing injury that could have been foreseen and guarded against, but it is not an insurer of the safety of its passengers.**

**If the defendant fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sykes v. Langley Cabs, Inc., 211 Va. 202, 208, 176 S.E.2d 417, 421 (1970)* (cab company); *Shamblee v. Virginia Transit Co., 204 Va. 591, 593, 132 S.E.2d 712, 714 (1963)* (bus company); *Crist v. Coach Co., 196 Va. 642, 645, 85 S.E.2d 213, 215 (1955)* (bus company); *Tri-State Coach Corp. v. Stidham, 191 Va. 790, 795, 62 S.E.2d 894, 896 (1951)* (bus company); *Norfolk-S. Ry. Co. v. Tomlinson, 116 Va. 153, 156–57, 81 S.E. 89, 90–91 (1914)* (railroad).

### PRACTICE COMMENTARY

This is a preliminary instruction and should be used in all cases. Included within the scope of "common carriers" are:

Taxicabs—*Terminal Cars, Inc. v. Wagner, 205 Va. 214, 219, 135 S.E.2d 802, 805 (1964).*

Buses—*Shamblee v. Virginia Transit Co., 204 Va. 591, 592–94, 132 S.E.2d 712, 713–14 (1963).*

Railroads—*Norfolk-S. Ry. Co. v. Tomlinson, 116 Va. 153, 156–58, 81 S.E. 89, 90–91 (1914).*

Ferries—*Chesapeake Ferry Co. v. Cummings, 158 Va. 33, 35–36, 164 S.E. 281, 281 (1932).*

Elevators—*Murphy's Hotel v. Cuddy's Adm'r, 124 Va. 207, 216, 97 S.E. 794, 797 (1919).*

Although several cases have declared that a passenger assumes all risks incidental to the use of the conveyance, the plaintiff is required to prove that the defendant failed to exercise the highest degree of practical care. *Shamblee, 204 Va. at 593–94, 132 S.E.2d at 714.*

In *Norfolk-Southern Railway Co.* the Court upheld a plaintiff's instruction charging the defendant with "the highest degree of care . . . known to human prudence and foresight," but further held the trial court had erred by not giving a defendant's instruction that stated that "a railroad company is not an insurer of its passengers, but merely has to use the highest degree of practical care for their safety." *Norfolk-S. Ry. Co., 116 Va. at 156–59, 81 S.E. at 90–91.* Other cases resolve the conflict between the highest degree of care and the premise that a common carrier is not an insurer of its passengers' safety by holding carriers to the highest degree of practical care. *Shamblee, 204 Va. at 593–94, 132 S.E.2d at 714.* Both phrases have been included in this instruction.

☞ ***PRACTICE POINTER:*** When the doctrine of *res ipsa loquitur* is applicable in this area, modify Instruction No. 7.050 by replacing "ordinary care" with "highest degree of practical care and foresight." *Virginia Elec. & Power Co. v. Lowry, 166*

*Va. 207, 212–13, 184 S.E. 177, 179 (1936).*

***ALERTS:***

• Plaintiff's requested instruction that would have informed the jury that the operator of the "Skyride" amusement ride, a monocable system that transports patrons of Busch Gardens amusement park to various locations within the park via gondolas and offers these patrons an aerial view of the amusement park, was a common carrier, thus owing plaintiff a high duty of care when she was a passenger on the Skyride, was properly rejected. The ride was deemed to be primarily for entertainment purposes, with the transportation function being incidental to the entertainment function, and the operator of the ride was deemed to not be in the regular business of undertaking for hire to transport persons from place to place. Accordingly, the ride operator was only required to exercise reasonable care for plaintiff's safety and protection. ***Bregel v. Busch Entm't Corp., 248 Va. 175, 177–78, 444 S.E.2d 718, 719–20 (1994).***

• The construction, maintenance, operation, and inspection of "amusement devices" are regulated pursuant to Va. Code Ann. § 36-98.3 and the Virginia Amusement Device Regulations, 13 Va. Admin. Code § 5-31-10 et seq. See also *Vuich v. Great E. Resort Corp., 281 Va. 240, 246–47, 704 S.E.2d 377, 380 (2011)* (finding "snow tube" ride in a "snow tubing park" is an amusement device falling under these regulations and requirements).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3, 16.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

## Instruction No. 22.010
## Duty of Care Owed to Incapacitated Passengers

**If a common carrier knows, or should know, that a passenger is unable to care for his own safety, it has a duty to use care, beyond that care given to a normal passenger, to protect a passenger in his condition from the dangers incident to his surroundings and mode of travel.**

**If a common carrier fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Tri-State Coach Corp. v. Stidham, 191 Va. 790, 797, 62 S.E.2d 894, 897 (1951)*; *Houston v. Strickland, 184 Va. 994, 1003, 37 S.E.2d 64, 67 (1946)*; *Walters v. Norfolk & W. Ry. Co., 122 Va. 149, 155–57, 94 S.E. 182, 184 (1917)*.

### PRACTICE COMMENTARY

This is a preliminary instruction; it should be used in cases where the injured passenger was intoxicated, a child, elderly, or otherwise physically or mentally handicapped.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

## Instruction No. 22.020
## Duty to Protect Passengers From Assault by Employees

**A common carrier has a duty to protect its passengers from any unjustified assault by its employees during the passenger-carrier relationship.**

**If a common carrier fails to perform this duty, then it is negligent.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Simpson v. Broadway-Manhattan Taxicab Corp., 203 Va. 892, 895–96, 128 S.E.2d 306, 309–10 (1962)*; *Norfolk & W. Ry. Co. v. Brame, 109 Va. 422, 429–30, 63 S.E. 1018, 1021 (1909).*

### Practice Commentary

A common carrier is liable for assaults on its passengers by employees if the assault occurs in or on the carrier's vehicle or during the existence of the passenger-carrier relationship. *Simpson, 203 Va. at 895, 128 S.E.2d at 309–10.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 25.02

Charles E. Friend & Kent Sinclair, The law of Evidence in Virginia § 4-20

Kent Sinclair, Virginia Remedies §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

Michie's Jurisprudence, Carriers §§ 35 through 73, 86 through 97

**Instruction No. 22.030**

**Duty to Protect Passengers From Assault by Other Passengers or Strangers**

**If a common carrier knows, or by the use of proper care should know, that a** [passenger; stranger] **probably will become a source of danger or menace to other passengers, it has a duty to use the highest degree of practical care and foresight to prevent any injury.**

**If a common carrier fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 46.2-2011.18, 56-354.

**CASE AUTHORITY:** *Virginia Ry. & Power Co. v. Hubbard, 120 Va. 664, 671–73, 91 S.E. 618, 620 (1917)*; *Virginia Ry. & Power Co. v. McDemmick, 117 Va. 862, 870, 86 S.E. 744, 747 (1915)*; *Norfolk & W. Ry. Co. v. Birchfield, 105 Va. 809, 822–23, 54 S.E. 879, 884 (1906).*

### PRACTICE COMMENTARY

This instruction is based upon language found in the Virginia Supreme Court's decision in *Hubbard.* The necessary elements giving rise to the duty are actual or constructive knowledge, probability of harm, and the power and the ability of the carrier to prevent any harm. It is less than clear from the cases what "proper care" is in the constructive knowledge context. The general rule is that the carrier is bound to use "the utmost skill and care of a prudent man in taking precautions to prevent its passenger from being injured by the ignorant, negligent or reckless acts of another." *Birchfield, 105 Va. at 822, 54 S.E. at 884.* The utmost degree of care means no more than every care which is practicable by common carriers engaged in the business of transporting passengers. *Shamblee v. Virginia Transit Co., 204 Va. 591, 593–94, 132 S.E.2d 712, 714 (1963).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

## Instruction No. 22.040
## Authority to Eject Disorderly Persons

**A common carrier has a duty to preserve order on its conveyance; accordingly, it may use all reasonable means and necessary force to remove disorderly persons from the conveyance.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 18.2-415, 46.2-2011.18, 56-354.

**CASE AUTHORITY:** *Norfolk & W. Ry. Co. v. Brame, 109 Va. 422, 430, 63 S.E. 1018, 1021 (1909)*; *Norfolk & W. Ry. Co. v. Birchfield, 105 Va. 809, 821–23, 54 S.E. 879, 883–84 (1906).*

### PRACTICE COMMENTARY

This instruction may be seen as corollary to Instruction No. 22.030 in that it states the authority granted a common carrier to eject disorderly passengers, thereby protecting other passengers.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

## Instruction No. 22.050
## Inception of Passenger-Carrier Relationship

**The passenger-carrier relationship begins when a person presents himself to the carrier for transportation under such circumstances of time, place, manner, and condition that the carrier is deemed to have accepted him as a passenger.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Greater Richmond Transit Co. v. Wilkerson, 242 Va. 65, 70, 406 S.E.2d 28, 32 (1991); Virginia Ry. & Power Co. v. Arnold, 121 Va. 204, 211–12, 92 S.E. 925, 927–28 (1917).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction should be used only when the injured party's status as a passenger is in issue and it is alleged that the injury occurred before the relationship arose. In such a situation, the carrier will normally contend that its liability to the plaintiff should be governed by a different legal doctrine, usually that applicable to owners and occupants of land. See Chapter 23, Owners and Occupants.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

## Instruction No. 22.060
## Termination of Passenger-Carrier Relationship

**The passenger-carrier relationship does not end until the passenger has exited the** [bus; train; taxi; ferry; elevator; (name of other similar type of conveyance)] **and has had a reasonable opportunity to reach a safe place.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sykes v. Langley Cabs, Inc., 211 Va. 202, 208, 176 S.E.2d 417, 421 (1970)*; *Tri-State Coach Corp. v. Stidham, 191 Va. 790, 795–96, 62 S.E.2d 894, 896–97 (1951).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction should be used only when the injured party's status as a passenger is in issue, and the injury is alleged to have occurred after the relationship ended. In such a situation, the carrier will normally be contending that its liability to the plaintiff is to be governed by some other legal doctrine such as those applicable to owners and occupants of land. See Chapter 23, Owners and Occupants.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.5, 2.6, 5.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 25.02

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES §§ 6-4, 6-5, 18-2, 25-2, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Carriers §§ 35 through 73, 86 through 97

# Chapter 23

# OWNERS AND OCCUPANTS

## Scope Note


**Instruction No. 23.000** **Definition of Trespasser**

**Instruction No. 23.010** **Definition of Licensee**

**Instruction No. 23.015** **Definition of Bare Licensee**

**Instruction No. 23.020** **Definition of Invitee**

**Instruction No. 23.030** **Invitee's Right to Assume Safe Condition of Premises**

**Instruction No. 23.040** **Occupant's Duty to Invitee: General**

**Instruction No. 23.050** **Occupant's Duty to Invitee: Remove Foreign Objects**

**Instruction No. 23.060** **Occupant's Duty to Social Guest: Activities on Premises**

**Instruction No. 23.070** **Occupant's Duty to Licensee or Social Guest: Condition of Premises**

**Instruction No. 23.080** **Occupant's Duty to Child: Dangerous Instrumentalities**

**Instruction No. 23.090** **Occupant's Duty to Trespasser and Bare Licensee**

**Instruction No. 23.100** **Invitee Exceeding the Scope of Invitation**

**Instruction No. 23.110** **Commercial Occupant's Duty to Remove Snow and Ice After Storm**

**Instruction No. 23.120** **Occupant's Responsibility for Dangerous Substances on Premises**

**Instruction No. 23.130** **Occupant's Duty to Law-Enforcement Officers, Fire Fighters and Other Designated Personnel**

# SCOPE NOTE

This chapter covers generally the duties of owners and occupants of property to those who enter the property. For the special duties of railroads to persons on railroad property, see Chapter 19, Railroads—Right-of-Way; for instructions in cases where a trespasser is being sued, see Chapter 27, Trespass. For cases where the injured party is a tenant, see Chapter 24, Landlord and Tenant.

With the exception of Instruction Nos. 23.000 and 23.130, the instructions in this chapter are based on common law rather than on statutory standards. Instruction Nos. 23.000, 23.010, 23.015 and 23.020 respectively define trespasser, licensee, bare licensee and invitee. The distinctions are important because the status of the person nearly always determines the standard of care owed him. A person who enters land as an invitee, to whom the highest degree of care is owed, may become a trespasser or a bare licensee by exceeding the scope of the occupant's invitation. See Instruction No. 23.100.

Instruction Nos. 23.030, 23.040, 23.050, and 23.110 cover the occupant's duties toward invitees. Instruction No. 23.040 concerns the occupant's duties with regard to the condition of the premises. The occupant is required to keep his premises reasonably safe. The invitee's right to assume that this standard has been met is covered in Instruction No. 23.030. Instruction No. 23.050 covers the occupant's duty to remove foreign objects from the floor.

The duties of an occupant toward social guests and licensees are covered in Instruction Nos. 23.060 and 23.070. Instruction No. 23.060 concerns the occupant's duty to social guests as far as the occupant's activities or conduct are concerned. Instruction No. 23.070 is the licensee counterpart to Instruction No. 23.040 applicable to invitees and is concerned with the conditions of the premises.

Instruction No. 23.080 addresses the occupant's duty to children when a dangerous instrumentality is present. In these cases, the occupant need not have actual knowledge of a child's presence, and the instruction applies whether the child is an invitee, licensee, or trespasser.

Instruction No. 23.090 covers the occupant's duty to trespassers and to bare licensees regarding the condition of the premises. The standard differs greatly from the standard of care owed to either licensees or invitees, covered in Instruction Nos. 23.070 and 23.040, respectively.

Instruction No. 23.120 covers the liability of an occupant for the escape of dangerous or offensive substances from his property. See also Chapter 26, Nuisance. For additional instructions in the case of escaped animals, see Chapter 29, Animals.

Instruction No. 23.130 covers the duty of an occupant to law-enforcement officers, fire fighters and other similar personnel who are deemed neither trespassers, licensees, nor invitees.

Where appropriate, the word "owner" may be substituted for "occupant," or both may be applicable.

## Instruction No. 23.000
## Definition of Trespasser

**A trespasser is one who goes upon the** [lands; premises] **of another without any legal right to do so and** [without the invitation, authority, or consent of the occupant of the [lands; premises]] [intentionally fails to leave the [lands; premises] of another after being requested to do so by the occupant]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 18.2-119, 18.2-120, 18.2-121, 18.2-121.2, 18.2-121.3, 18.2-125, 18.2-128, 18.2-131, 18.2-132, 18.2-132.1, 18.2-134.

**CASE AUTHORITY:** *Pearson v. Canada Contracting Co., 232 Va. 177, 182, 349 S.E.2d 106, 110 (1986); Richmond Bridge Corp. v. Priddy, 167 Va. 114, 118, 187 S.E. 518, 519 (1936).*

### PRACTICE COMMENTARY

This instruction should be given when there is a jury issue as to whether the plaintiff was an invitee, a licensee, a bare licensee, or a trespasser. The terms "licensee," "bare licensee" and "invitee" respectively are defined in Instruction Nos. 23.010, 23.015 and 23.020.

When the trespasser is the one who is being sued instead of the one suing, see Chapter 27, Trespass. For criminal instructions on trespass, see Chapter 49 of *Virginia Model Jury Instructions—Criminal.*

☞ ***PRACTICE POINTER:*** "Owner" may be substituted in appropriate cases for "occupant," or both may be necessary.

### ***ALERTS:***

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

**Instruction No. 23.010**
**Definition of Licensee**

**A licensee is one who enters the premises of another for his own convenience, benefit, or pleasure, with the knowledge and express or implied consent of the occupant.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Station # 2, LLC v. Lynch, 280 Va. 166, 176, 695 S.E.2d 537, 542–43 (2010)*; *Pearson v. Canada Contracting Co., 232 Va. 177, 182–83, 349 S.E.2d 106, 110 (1986)*; *Bradshaw v. Minter, 206 Va. 450, 452, 143 S.E.2d 827, 828–29 (1965)*; *Ingle v. Clinchfield R. Co., 169 Va. 131, 137, 192 S.E. 782, 784 (1937)*; *Pettyjohn & Sons v. Basham, 126 Va. 72, 79–80, 100 S.E. 813, 815 (1919)*; *Chesapeake & Ohio R.R. Co. v. Corbin's Adm'r, 110 Va. 700, 702–05, 67 S.E. 179, 180 (1909)*.

### PRACTICE COMMENTARY

This instruction should be given when there is a jury issue as to whether the plaintiff was an invitee, a licensee, a bare licensee, or a trespasser. The terms "trespasser," "bare licensee" and "invitee" respectively are defined in Instruction Nos. 23.000, 23.015 and 23.020.

A license should be distinguished from an easement. An easement permits the continuous use of the real property subject to the easement, while a license permits entry onto the real property of another without the right to such continuing use. *Station # 2, LLC, 280 Va. at 176, 695 S.E.2d at 542–43*. A license may also be granted orally. *Id. at 176, 695 S.E.2d at 543*. The granting of an easement, on the other hand, falls within the statute of frauds and must be evidenced by a writing. *Id.* See *Beach v. Turim, 287 Va. 223, 229, 754 S.E.2d 295, 297–98 (2014)*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18

## Instruction No. 23.015
## Definition of Bare Licensee

**A bare licensee is** [one who is permitted to enter the premises for his own convenience, benefit, or pleasure by the passive acquiescence of the owner; a social guest]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Franconia Assocs. v. Clark, 250 Va. 444, 447, 463 S.E.2d 670, 673 (1995); Bauer v. Harn, 223 Va. 31, 37, 286 S.E.2d 192, 195 (1982); Appalachian Power Co. v. LaForce, 214 Va. 438, 441, 201 S.E.2d 768, 770 (1974); Bradshaw v. Minter, 206 Va. 450, 452, 143 S.E.2d 827, 828–29 (1965); Lunsford's Administrator v. Colonial Coal & Coke Co., 115 Va. 346, 348–49, 79 S.E. 348, 349 (1913).*

### PRACTICE COMMENTARY

This instruction should be given when there is a jury issue as to whether the plaintiff was an invitee, a licensee, a bare licensee, or a trespasser. It is intended to include business visitors.

Use this instruction with Instruction No. 23.090 when the case involves a bare licensee or a trespasser. This instruction may also be appropriate in conjunction with Instruction No. 23.100 when there is a jury issue as to the status of an invitee who has exceeded the scope of the invitation.

A social guest is not an invitee but a bare licensee. *Bauer, 223 Va. at 37, 286 S.E.2d at 195*; *Bradshaw, 206 Va. at 452, 143 S.E.2d at 828–29*. This is true no matter how "cordially [the social guest] may have been invited and urged to come . . . ." *Bradshaw, 206 Va. at 452, 143 S.E.2d at 828–29*. Notwithstanding the social guest's status as a bare licensee, however, the duties owed to a social guest vary depending upon the circumstances. Instruction No. 23.090 covers an occupant's general duty to a bare licensee, including a social guest. Instruction No. 23.060 covers an occupant's duty to a social guest regarding the occupant's activities on the premises. Instruction No. 23.070 covers an occupant's duties to a social guest regarding the condition of the premises.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18

**Instruction No. 23.020**
**Definition of Invitee**

**An invitee is one who visits premises lawfully at the express or implied invitation of the occupant. He is one who visits other than for a social purpose or for his own convenience.**

**An express invitation is one made directly or indirectly by spoken or written words to come on the premises.**

**An implied invitation is one made by opening the premises to others for a particular purpose.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Franconia Assocs. v. Clark, 250 Va. 444, 447, 463 S.E.2d 670, 673 (1995)*; *Pearson v. Canada Contracting Co., 232 Va. 177, 182–83, 349 S.E.2d 106, 110 (1986)*; *Colonial Natural Gas Co. v. Sayers, 222 Va. 781, 784, 284 S.E.2d 599, 601 (1981)*; *City of Richmond v. Grizzard, 205 Va. 298, 302, 136 S.E.2d 827, 830 (1964)*; *Pettyjohn & Sons v. Basham, 126 Va. 72, 78, 100 S.E. 813, 815 (1919)*.

### PRACTICE COMMENTARY

This instruction should be given only when there is a jury issue as to whether the plaintiff was an invitee, a licensee, a bare licensee, or a trespasser. It is intended to include business visitors.

### *ALERTS:*

- A social guest is not an invitee. *Bauer v. Harn, 223 Va. 31, 37, 286 S.E.2d 192, 195 (1982)*; *Bradshaw v. Minter, 206 Va. 450, 452–53, 143 S.E.2d 827, 828–29 (1965)*. However, in the non-tort context of interpreting specific restrictive covenants applicable to a private residential community, "invitee" has been construed to have its common meaning and thus to include "social guests" and business visitors. *Bauer, 223 Va. at 37–38, 286 S.E.2d at 195*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18

## Instruction No. 23.030
## Invitee's Right to Assume Safe Condition of Premises

**An invitee has the right to assume that the premises are reasonably safe for his visit. This assumption does not apply if the invitee** [knows, or should have known, of the unsafe condition; uses the premises in a manner that exceeds the scope of the invitation; goes to a place on the premises where he is not reasonably expected to go]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Franconia Assocs. v. Clark, 250 Va. 444, 446–47, 463 S.E.2d 670, 672–73 (1995)*; *City of Suffolk v. Hewitt, 226 Va. 20, 24, 307 S.E.2d 444, 446 (1983)*; *Tazewell Supply Co. v. Turner, 213 Va. 93, 95, 189 S.E.2d 347, 349 (1972)*; *Knight v. Moore, 179 Va. 139, 146, 18 S.E.2d 266, 269–70 (1942)*.

### PRACTICE COMMENTARY

The appropriate phrase should be selected from within the brackets if there is a factual issue as to whether the assumption applies.

The occupant of the premises is not required to give notice of an open and obvious danger to an individual who is exercising reasonable care for his or her own safety. *Tazewell Supply Co., 213 Va. at 95, 189 S.E.2d at 349*. An invitee is not required to be on the lookout for dangers that are not open and obvious. *Comess v. Norfolk General Hospital, Inc., 189 Va. 229, 235, 52 S.E.2d 125, 128 (1949)*. See Instructions No. 23.040 (Occupant's Duty to Invitee: General) and 23.100 (Invitee Exceeding the Scope of Invitation).

### *ALERTS:*

- This instruction is not applicable to licensees or trespassers.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.040
## Occupant's Duty to Invitee: General

**An occupant of premises does not guarantee an invitee's safety, but has the duty:**

**(1) to use ordinary care to have the premises in a reasonably safe condition for an invitee's use consistent with the invitation unless the invitee** [knows, or should have known, of the unsafe condition; uses the premises in a manner that exceeds the scope of the invitation; goes to a place on the premises where he is not reasonably expected to go]**; and**

**(2) to use ordinary care to warn an invitee of any unsafe condition about which the occupant knows, or by the use of ordinary care should know, unless the unsafe condition is open and obvious to a person using ordinary care for his own safety.**

**If an occupant fails to perform any of these duties, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *AlBritton v. Commonwealth, 299 Va. 392, 853 S.E.2d 512 (2021)*; *Volpe v. City of Lexington, 281 Va. 630, 636, 708 S.E.2d 824, 827 (2011)*; *Fultz v. Delhaize Am., Inc., 278 Va. 84, 88–89, 677 S.E.2d 272, 274 (2009)*; *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 689, 594 S.E.2d 908, 912 (2004)*; *O'Brien v. Everfast, Inc., 254 Va. 326, 331, 491 S.E.2d 712, 715 (1997)*; *Austin v. Shoney's, Inc., 254 Va. 134, 139, 486 S.E.2d 285, 288 (1997)*; *Franconia Assocs. v. Clark, 250 Va. 444, 446–47, 463 S.E.2d 670, 672–73 (1995)*; *Ashby v. Faison & Assocs., 247 Va. 166, 169–71, 440 S.E.2d 603, 604–05 (1994)*; *Grim v. Rahe, Inc., 246 Va. 239, 242–43, 434 S.E.2d 888, 889–90 (1993)*; *Runyon v. Geldner, 237 Va. 460, 465, 377 S.E.2d 456, 459 (1989)*; *Fobbs v. Webb Bldg. Ltd. P'ship, 232 Va. 227, 229, 349 S.E.2d 355, 357 (1986)*; *Appalachian Power Co. v. Sanders, 232 Va. 189, 194, 349 S.E.2d 101, 104–05 (1986)*; *City of Suffolk v. Hewitt, 226 Va. 20, 24, 307 S.E.2d 444, 446 (1983)*; *Indian Acres of Thornburg, Inc. v. Denion, 215 Va. 847, 849–50, 213 S.E.2d 797, 799 (1975)*; *Wynne v. Spainhour, 215 Va. 16, 17, 205 S.E.2d 634, 635 (1974)*; *Tazewell Supply Co. v. Turner, 213 Va. 93, 95, 189 S.E.2d 347, 349 (1972)*.

### PRACTICE COMMENTARY

An occupier's duty to an invitee does not normally include a warning of or protection against third-party criminal acts perpetrated against the invitee. Whether a legal duty in tort exists is a pure question of law to be reviewed *de novo*. *Volpe, 281 Va. at 636, 708 S.E.2d at 827*. For a discussion of the legal duty concerning third-party criminal acts, see *Commonwealth v. Peterson, 286 Va. 349, 355–56, 749 S.E.2d 307, 311 (2013)*; *Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 137–38, 540 S.E.2d 129, 131–32 (2001)*; *Thompson v. Skate Am., Inc., 261 Va. 121, 128, 540 S.E.2d 123, 127 (2001)*; *Burns v. Johnson, 250 Va. 41, 44, 458 S.E.2d 448, 450 (1995)*; *Gupton v. Quicke, 247 Va. 362, 363, 442 S.E.2d 658, 658–59 (1994)*; *Wright v. Webb, 234 Va. 527, 530, 362 S.E.2d 919, 920 (1987)*. See also *Taboada v. Daly Seven, Inc., 271 Va. 313, 322–23, 626 S.E.2d 428, 432–33 (2006)* (special relationship exists between an innkeeper and guest).

### *ALERTS:*

- For an instruction on the duty of a commercial occupant to remove snow and ice after a storm, see Instruction No. 23.110.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 16 through 18; Trespass §§ 1 through 26

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.050
## Occupant's Duty to Invitee: Remove Foreign Objects

**An occupant of premises has the duty to an invitee to use ordinary care to remove a foreign substance or object from the floor if the foreign substance or object creates an unsafe condition, within a reasonable time after he knew, or should have known, it was there, regardless of how it got there.**

**If an occupant fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Austin v. Shoney's, Inc., 254 Va. 134, 138–39, 486 S.E.2d 285, 287–88 (1997)*; *Ashby v. Faison & Assocs., 247 Va. 166, 170, 440 S.E.2d 603, 605 (1994)*; *Winn-Dixie Stores, Inc. v. Parker, 240 Va. 180, 182–83, 396 S.E.2d 649, 650 (1990)*; *Memco Stores, Inc. v. Yeatman, 232 Va. 50, 54–55, 348 S.E.2d 228, 230–31 (1986)*; *Colonial Stores, Inc. v. Pulley, 203 Va. 535, 537, 125 S.E.2d 188, 190 (1962)*; *Great Atl. & Pac. Tea Co. v. Rosenberger, 203 Va. 378, 380, 124 S.E.2d 26, 28 (1962)*.

### PRACTICE COMMENTARY

See Instruction No. 23.040, Occupant's Duty to Invitee: General.

If the foreign object is snow or ice on walkways, see Instruction Nos. 23.110 (Commercial Occupant's Duty to Remove Snow and Ice After Storm) and 24.030 (Landlord's Duty to Remove Snow and Ice After Storm).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.060
## Occupant's Duty to Social Guest: Activities on Premises

**An occupant of premises owes a duty to a social guest on the premises to use ordinary care in his activities or conduct to avoid injury to the social guest.**

**If the occupant fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Shoemaker v. Funkhouser, 299 Va. 471, 856 S.E.2d 174 (2021)*; *Reagan v. Perez, 215 Va. 325, 326, 209 S.E.2d 901, 902 (1974)*; *Busch v. Gaglio, 207 Va. 343, 346, 150 S.E.2d 110, 113 (1966)*; *Limberg v. Lent, 206 Va. 425, 426, 143 S.E.2d 872, 873 (1965)*; *Bradshaw v. Minter, 206 Va. 450, 453–55, 143 S.E.2d 827, 829–30 (1965)*.

### PRACTICE COMMENTARY

This instruction addresses the duty of an occupant to a social guest when the social guest is injured by the active negligence of the occupant. Normally, the occupant is only liable when his willful-and-wanton conduct injures a social guest. *Reagan, 215 Va. at 326, 209 S.E.2d at 902*. Activities and conduct of the occupant, however, are exceptions to the general rule. In such situations, an ordinary-care standard is applicable where the active negligence of the occupant causes injury to a social guest. *Busch, 207 Va. at 346, 150 S.E.2d at 112*. See *Shoemaker v. Funkhouser, 299 Va. at 482–484, 856 S.E.2d at 180–181* (landowners have a limited duty in tort to prevent activity on their property that could harm other persons who are not on their property).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.070
## Occupant's Duty to Licensee or Social Guest: Condition of Premises

**An occupant of premises has a duty to a** [licensee; social guest] **to use ordinary care either to make an unsafe condition safe or warn of the unsafe condition when:**

**(1) the occupant knows, or should know, of an unsafe condition on his premises; and**

**(2) the occupant knows, or should know, that it involves an unreasonable risk of harm to a** [licensee; social guest]**; and**

**(3) the occupant knows, or should know, that a** [licensee; social guest] **will not discover or realize the unsafe condition; and**

**(4) the** [licensee; social guest] **does not know, or have reason to know, of the unsafe condition and the risk involved.**

**If the occupant fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Reagan v. Perez, 215 Va. 325, 326, 209 S.E.2d 901, 902 (1974)*; *Busch v. Gaglio, 207 Va. 343, 347–49, 150 S.E.2d 110, 113 (1966).*

### PRACTICE COMMENTARY

This instruction addresses the duty of an occupant to a licensee or social guest when the licensee or social guest is injured by the occupant's failure to warn the licensee or social guest of an unsafe condition. Normally, the occupant is only liable when his willful-and-wanton conduct injures the licensee. *Reagan, 215 Va. at 326, 201 S.E.2d at 902*. An exception exists, however, for "condition of the premises" cases. In such cases, the occupant is liable if the elements of this instruction are proved. *Busch, 207 Va. at 346–47, 150 S.E.2d at 112–13*. The *Busch* case involved a social guest. *Id. at 344, 150 S.E. 2d at 111*. Relying on prior decisions, the Court stated that a social guest is "nothing more than a licensee." *Id.* See *Bradshaw v. Minter, 206 Va. 450, 452, 143 S.E.2d 827, 828–29 (1965)*).

For the duty of care and liability of a landowner to persons using his premises for recreational and other listed purposes, see Va. Code Ann. § 29.1-509 (Recreational Land Use Act). See *Shoemaker v. Funkhouser, 299 Va. 471, 485–486, 856 S.E.2d 174, 181–182 (2021)* ("recreational immunity" statute does not extend to activities that are not listed, like target shooting).

### *ALERTS:*

- An occupant of premises always owes a duty to a licensee not to injure him wantonly or intentionally. The Committee offers no conclusion as to whether this instruction applies to frequent trespassers.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.080
## Occupant's Duty to Child: Dangerous Instrumentalities

**An occupant of premises who:**

**(1) has a dangerous** [object; instrumentality] **on the premises, the dangerous nature of which is not obvious to children;**

**(2) knows, or by the use of ordinary care should know, that the premises are easily accessible to young children; and**

**(3) knows, or by the use of ordinary care should know, that young children are frequently on or near the premises;**

**has a duty to use ordinary care for the safety of those children with respect to the dangerous** [object; instrumentality] [even if they are trespassers]**.**

**If the occupant fails to perform this duty, then he is negligent.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 255–56, 520 S.E.2d 164, 176 (1999)*; *Grim v. Rahe, Inc., 246 Va. 239, 242, 434 S.E.2d 888, 889–90 (1993)*; *Appalachian Power Co. v. LaForce, 214 Va. 438, 440–41, 201 S.E.2d 768, 770 (1974)*; *Washabaugh v. Northern Virginia Const. Co., 187 Va. 767, 770, 48 S.E.2d 276, 277–78 (1948)*; *Daugherty v. Hippchen, 175 Va. 62, 65–66, 7 S.E.2d 119, 120–21 (1940)*.

### Practice Commentary

It is not clear from the cases how young a child must be for this instruction to be applicable. Presumably, the determination will rest upon the standards delineating when an infant can and cannot be negligent. See Instruction Nos. 6.005, 6.010, 6.020 and 6.030; *Sullivan v. Sutherland, 206 Va. 377, 379–80, 143 S.E.2d 920, 922 (1965)*; *Vought v. Jones, 205 Va. 719, 725, 139 S.E.2d 810, 815 (1965)*; *Gabbard v. Knight, 202 Va. 40, 46, 116 S.E.2d 73, 77 (1960)*. Compare *LaForce, 214 Va. at 441, 201 S.E.2d at 770–71* (denying recovery as a matter of law to a 14-year-old boy who was electrocuted by a live power-company wire while he was on the power company's right-of-way without permission), with *Dungee, 258 Va. at 246–49, 520 S.E.2d at 171–73* (affirming jury verdict in favor of a 10-year-old boy who allegedly suffered from Attention Deficit Hyperactivity Disorder and who was injured while trespassing on the grounds of a power station).

A "dangerous instrumentality" is "[a]n instrument, substance, or condition so inherently dangerous that it may cause serious bodily injury or death without human use or interference." *Dangerous* Instrumentality, Black's Law Dictionary (11th ed. 2019).

For additional discussion and authorities regarding dangerous instrumentalities and related activities, and the duty of care arising therefrom, see the Sources & Authority statement for Instruction No. 30.000.

### *ALERTS:*

• Virginia has steadfastly maintained that it does not recognize the attractive nuisance doctrine. *Washabaugh, 187 Va. at 769, 48 S.E.2d at 277*. At the same time it has allowed trespassing children to recover damages where adults would not have prevailed. *Id.* The general rule seems to be that, even if an immature child is a trespasser, one who stores explosives or has control of other dangerous instrumentalities is not relieved of the duty of exercising a proper degree of care for his protection. If the one who keeps explosives is negligent in leaving them in a place accessible to children whom he knows or should know are accustomed to play nearby, the fact that the child is a trespasser will not relieve the owner from liability. The same is true as to other dangerous instrumentalities. *Dungee, 258 Va. at 255–56, 520 S.E.2d at 176*.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

See also the Research References provided for the Instructions in Chapter 30, Dangerous Instrumentalities

## Instruction No. 23.090
## Occupant's Duty to Trespasser and Bare Licensee

**An occupant of premises has a** [duty not to willfully or intentionally cause injury to a [trespasser; bare licensee]; duty to protect a [trespasser; bare licensee] if he knows, or reasonably should have known of the [trespasser's; bare licensee's] danger, and could have avoided the danger by the use of ordinary care]**.**

**If an occupant fails to perform this duty, then he is negligent.**

**An occupant of premises has no duty to a** [trespasser; bare licensee] **to keep his premises in a safe condition for the** [trespasser's; bare licensee's] **use.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Franconia Assocs. v. Clark, 250 Va. 444, 447, 463 S.E.2d 670, 673 (1995)*; *Appalachian Power Co. v. LaForce, 214 Va. 438, 441, 201 S.E.2d 768, 770 (1974)*; *Lunsford's Adm'r v. Colonial Coal & Coke Co., 115 Va. 346, 348–49, 79 S.E. 348, 349 (1913).*

### PRACTICE COMMENTARY

This instruction applies to trespassers and to bare licensees. *Franconia Assocs. 250 Va. at 447, 463 S.E.2d at 673*; *LaForce, 214 Va. at 441, 201 S.E.2d at 770.*

Use Instruction Nos. 23.000 (Definition of Trespasser) or 23.015 (Definition of Bare Licensee) in conjunction with this instruction under the circumstances of the case.

### *ALERTS:*

- A possessor of real property, including an owner, lessee, or other lawful occupant, owes no duty of care to a trespasser except in those circumstances where a common-law right of action, statutory right of action, or judicial exception existed as of July 1, 2013. Va. Code Ann. § 8.01-219.1.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.100
## Invitee Exceeding the Scope of Invitation

**An invitee, while using premises in a way that exceeds the scope of the occupant's invitation to him, ceases to be an invitee and becomes a** [trespasser; bare licensee]**.**

**An occupant of the premises has no duty to inspect the premises or keep the premises safe for the** [trespasser's; bare licensee's] **use.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Franconia Assocs. v. Clark, 250 Va. 444, 446–47, 463 S.E.2d 670, 672–73 (1995)*; *City of Suffolk v. Hewitt, 226 Va. 20, 24, 307 S.E.2d 444, 446 (1983)*; *Raven Red Ash Coal Co. v. Griffith, 181 Va. 911, 924–26, 27 S.E.2d 360, 366 (1943)*; *Knight v. Moore, 179 Va. 139, 146, 18 S.E.2d 266, 270–71 (1942)*; *Thalhimer Bros., Inc. v. Casci, 160 Va. 439, 444, 168 S.E. 433, 434–35 (1933).*

### PRACTICE COMMENTARY

Use Instruction Nos. 23.000 (Definition of Trespasser) or 23.015 (Definition of Bare Licensee) in conjunction with this instruction under the circumstances of the case.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.110
## Commercial Occupant's Duty to Remove Snow and Ice After Storm

**An occupant of commercial premises has a duty to an invitee to use ordinary care to remove ice or snow from** [outdoor entrance walks; steps; porches; stoops; parking lots] **within a reasonable time after the** [freezing rain; snow] **stops falling.**

**If an occupant fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Amos v. NationsBank, N.A., 256 Va. 344, 346, 504 S.E.2d 365, 366 (1998)*; *Mary Washington Hosp., Inc. v. Gibson, 228 Va. 95, 101, 319 S.E.2d 741, 744–45 (1984)*; *Kings Markets, Inc. v. Yeatts, 226 Va. 174, 180, 307 S.E.2d 249, 253 (1983)*; *Walker v. Memorial Hosp., 187 Va. 5, 13, 45 S.E.2d 898, 902 (1948)*.

### PRACTICE COMMENTARY

This instruction covers the duty of owners and occupants of commercial establishments to use ordinary care to remove natural accumulations of snow and ice within a reasonable length of time after the precipitation stops falling. The same duty applies to landlords. See *FAD Ltd. P'ship, 237 Va. at 415, 377 S.E.2d at 438*; *Langhorne Rd. Apartments, Inc. v. Bisson, 207 Va. 474, 476–77, 150 S.E.2d 540, 541–42 (1966)*; see also Instruction 24.030 (Landlord's Duty to Remove Snow and Ice After Storm).

Although some municipalities have ordinances requiring abutting property owners to clear ice and snow from adjacent municipal sidewalks within a fixed period of time, no civil liability can be imposed on the property owner for failing to comply with these ordinances. In *Johnson v. J.S. Bell, Jr. & Co., 202 Va. 274, 117 S.E.2d 85 (1960)*, the Court held that this type of ordinance was not a safety statute for the benefit of the traveling public. *Id. at 277*, 117 S.E.2d at 88. The purpose of the ordinance is to force abutting property occupants to aid the municipalities with snow removal. *Id.*

☞ ***PRACTICE POINTER:*** For in-depth discussions of contributory negligence in premises cases, see *Fultz v. Delhaize Am., Inc., 278 Va. 84, 89–91, 677 S.E.2d 272, 275–76 (2009)* and *Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 358, 397 S.E.2d 821, 823–24 (1990)*.

### ***ALERTS:***

- The *Walker* and *FAD Ltd. Partnership* cases say very explicitly that the duty to clear ice and snow does not arise until a reasonable time after the snow or freezing rain has ceased to fall. See *Walker, 187 Va. at 13–15, 45 S.E.2d at 902–04* and *FAD Ltd. Partnership v. Feagley, 237 Va. 413, 415, 377 S.E.2d 437, 438 (1989)* (discussing landlords' duties). If there is a dispute as to whether the precipitation had ceased or was still ongoing, the jury must be instructed to resolve the conflict about the weather conditions.
- This instruction does not apply to the owner or occupier of a private residence. *Tate v. Rice, 227 Va. 341, 348, 315 S.E.2d 385, 389–90 (1984)*.
- The duty of the owner or occupier of a private residence to maintain his premises in a condition that is reasonably safe for an invitee does not extend to warning of, or removing, a danger that is open and obvious. *Id.*

***RESEARCH REFERENCES:***

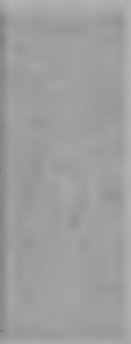
Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26



## Instruction No. 23.120
## Occupant's Responsibility for Dangerous Substances on Premises

**An occupant of premises who keeps a** [dangerous; offensive] **substance on the premises has an absolute duty not to let it escape.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Akers v. Mathieson Alkali Works, 151 Va. 1, 11, 144 S.E. 492, 495 (1928).*

### PRACTICE COMMENTARY

This instruction is designed to be applied in situations involving conditions on the land. The language of the case, however, suggests that it may be adapted to situations involving injuries caused by escaped animals. See Instruction No. 29.030 (Duty of Owner of Wild Animals).

☞ ***PRACTICE POINTER:*** For a discussion of the respective duties of owners, current and prior, for leeching effects of toxic materials on adjacent property, see *Philip Morris, Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268 (1988).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 16 through 18; Trespass §§ 1 through 26

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

## Instruction No. 23.130
## Occupant's Duty to Law-Enforcement Officers, Fire Fighters and Other Designated Personnel

**Where an occupant of premises:**

(1) **knows, or has reason to know, of a dangerous condition on his premises; and**

(2) **knows, or has reason to know, of the presence on his premises of a** [law-enforcement officer; fire fighter; individual designated in § 8.01-226]; **and**

(3) **knows, or has reason to know, that the** [law-enforcement officer; fire fighter; individual designated in § 8.01-226] **is unaware of the dangerous condition;**

**then an occupant has the duty to use ordinary care either to make the condition reasonably safe or to warn the** [law-enforcement officer; fire fighter; individual designated in § 8.01-226] **of the dangerous condition.**

**If an occupant fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-226.

**CASE AUTHORITY:** *Pearson v. Canada Contr'g Co., 232 Va. 177, 185, 349 S.E.2d 106, 111–12 (1986).*

### PRACTICE COMMENTARY

*Pearson* is applicable to "officially privileged person[s]" such as firemen or policemen. *232 Va. at 185, 349 S.E.2d at 111.* Va. Code Ann. § 8.01-226 expands the category of protected persons to include, among others, emergency medical personnel, special forest wardens, hazardous materials officers, and emergency response team members.

*Pearson* expressly was limited to premises not open to the public. *232 Va. at 185, 349 S.E.2d at 111.* Va. Code Ann. § 8.01-226 now makes the duties applicable also to "premises normally open to the public."

☞ ***PRACTICE POINTER:*** "Owner" should be substituted for "occupant" in appropriate cases. As appropriate, the specific category of personnel listed in Va. Code Ann. § 8.01-226 should be substituted in the bracketed portions of this instruction.

### *ALERTS:*

- Va. Code Ann. § 8.01-226 sets forth the duty of care owed to fire fighters, law-enforcement officers and other designated personnel while performing their duties. It provides, "[w]hile otherwise engaged in the performance of his duties [such personnel] shall be owed a duty of ordinary care." Va. Code Ann. § 8.01-226. The term "firefighter" includes emergency medical personnel and special forest wardens. *Id.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES Chapters 27 & 70

MICHIE'S JURISPRUDENCE, Negligence §§ 16 through 18; Trespass §§ 1 through 26

# Chapter 24

# LANDLORD AND TENANT

## Scope Note


**Instruction No. 24.000** **Landlord's Duty Upon Surrendering Control**

**Instruction No. 24.010** **Landlord's Duty to Maintain Common Areas**

**Instruction No. 24.020** **Landlord's Liability for Repairs Made**

**Instruction No. 24.025** **Burden of Proving Landlord's Failure to Exercise Reasonable Care in Making Repairs**

**Instruction No. 24.030** **Landlord's Duty to Remove Snow and Ice After Storm**

**Instruction No. 24.040** **Tenant's Liability for Waste**

**Instruction No. 24.050** **Waste: Double Damages**

# SCOPE NOTE

These instructions cover some duties and liabilities of landlords and tenants. Many aspects of rental agreements have been codified. Va. Code Ann. §§ 8.01-178.2–8.01-178.4 (Waste); Va. Code Ann. §§ 55.1-1200–55.1-1259 (Virginia Residential Landlord and Tenant Act); Va. Code Ann. §§ 55.1-1300–55.1-1319 (Manufactured Home Lot Rental Act); Va. Code Ann. §§ 55.1-1400–55.1-1428 (Nonresidential Tenancies). In 1974, the legislature enacted the Virginia Residential Landlord and Tenant Act, Va. Code Ann. §§ 55.1-1200–55.1-1259 (the "Act"). The Act governs all residential landlord-tenant relationships, subject to certain exemptions set forth in Va. Code Ann. § 55.1-1201. The Act departs from the common law and imposes a duty on the landlord to put and keep the premises in a fit and habitable condition. Va. Code Ann. § 55.1-1220.

The Act does not abrogate the common-law rule that a landlord is not liable in tort to a tenant for personal injury resulting from the landlord's failure to repair premises under the tenant's possession and control. *Isbell v. Commercial Inv. Assocs., 273 Va. 605, 614, 644 S.E.2d 72, 76 (2007).*

The Act also imposes duties on the tenant and provides new remedies for both parties. To date, the litigation under the Act has not resulted in many jury questions. Therefore, the instructions draw heavily on the common law and provide references to the Act.

There are four instructions governing the landlord's duty to the tenant. Instruction No. 24.000 covers the landlord's common-law duty to warn the tenant of a known dangerous condition before the tenant enters into possession. However, the landlord is not liable if the dangerous condition was open and obvious, or if the tenant knew about it or should have discovered it by making a reasonable inspection. While this basic duty is governed by common law, the Act statutorily modified the duties of both landlord and tenant. These provisions might be used either to expand or limit the duties and liabilities of both landlord and tenant. For example, in Va. Code Ann. § 55.1-1220(A)(1), a duty is imposed on the landlord to comply with any building and housing-code provisions that materially affect health and safety. The reference to "safety" was intentional; elsewhere in the Act a distinction is drawn between the landlord's duty to keep the premises in a *fit and habitable condition* (Va. Code Ann. § 55.1-1220(A)(2)) and his duty to keep the common areas of the premises *clean and structurally safe*. (Va. Code Ann. § 55.1-1220(A)(3)). Va. Code Ann. § 55.1-1227(A)(1) imposes a duty on the tenant to comply with building and housing-code provisions that materially affect health and safety. The tenant also is required to keep the part of the premises he occupies and uses as clean and safe as the condition of the premises permits. Va. Code Ann. § 55.1-1227(A)(2).

Instruction No. 24.010 covers the landlord's common-law duty to use ordinary care when maintaining common areas.

Instruction No. 24.020 covers the common-law duty of the landlord to use reasonable care in making repairs. Under the Act, the landlord's duty is to make repairs and do whatever is necessary to put the premises in a fit and habitable condition. Va. Code Ann. § 55.1-1220(A)(2).

Instruction No. 24.025 covers the tenant's burden to prove the landlord failed to use

reasonable care in making repairs.

Instruction No. 24.030 covers the landlord's common law duty to remove snow and ice after a storm. A parallel instruction ("Commercial Occupant's Duty to Remove Snow and Ice After Storm") appears in Owners and Occupants, Instruction No. 23.110.

Two instructions address the tenant's liability for waste. Instruction No. 24.040 covers the landlord's remedy against the tenant for damage done to the property. The Act requires the tenant to use all facilities and appliances on the premises in a reasonable manner and not destroy, deface, damage, impair or remove any part of the premises deliberately or negligently, or permit any other person to do so. Va. Code Ann. § 55.1-1227(A)(7). The landlord's remedy for the tenant's violation of that duty is found in Va. Code Ann. § 55.1-1248 and is encompassed within the instruction.

Instruction No. 24.050 covers the landlord's statutory right to double damages for waste pursuant to the provisions of Va. Code Ann. § 8.01-178.2 if the tenant's acts are wanton.

## Instruction No. 24.000
## Landlord's Duty Upon Surrendering Control

**A landlord who knows that a dangerous condition exists has a duty to warn the tenant about it before the tenant enters into possession. The landlord does not have this duty when the condition is open and obvious or if the tenant knew of the condition or should have discovered it by making a reasonable inspection.**

**If a landlord fails to perform this duty, then he is negligent.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *John Aragona Enterprises, Inc. v. Miller, 213 Va. 298, 299–300, 191 S.E.2d 804, 805 (1972)*; *Caudill v. Gibson Fuel Co., 185 Va. 233, 240–41, 38 S.E.2d 465, 469 (1946)*; *Berlin v. Wall, 122 Va. 425, 436, 95 S.E. 394, 398 (1918).*

## Practice Commentary

The common law duty of the landlord may be expanded by Va. Code Ann. § 55.1-1220. For example, a duty is imposed on the landlord to comply with requirements of applicable building and housing codes materially affecting health and safety. Va. Code Ann. § 55.1-1220(A)(1). However, Va. Code Ann. § 55.1-1220 does not give rise to an action in tort for personal injury when a tenant has exclusive control of the property. *Isbell v. Commercial Inv. Assocs., 273 Va. 605, 612–14, 644 S.E.2d 72, 75–76 (2007).* Note the distinction drawn in the statute between a landlord's duty to keep the premises in a *fit and habitable* condition and his duty to keep the common areas *clean and structurally safe.*

If, contrary to the rental agreement or the provisions of the Act, the landlord willfully or negligently fails to supply heat, running water, hot water, electricity, gas, or other essential service, the tenant may (1) recover damages based upon the diminution of the fair rental value of the rental unit; or (2) procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance, as determined by the court. Va. Code Ann. § 55.1-1239(A). The tenant may also recover reasonable attorney fees under this section of the Code. Va. Code Ann. § 55.1-1239(B). However, a tenant proceeding under Va. Code Ann. § 55.1-1239 may not also proceed under Va. Code Ann. § 55.1-1234 as to the same breach.

The tenant is required to comply with obligations primarily imposed upon tenants by provisions of building and housing codes materially affecting health and safety. Va. Code. Ann. § 55.1-1227(A)(1). The tenant also must keep the dwelling unit and that part of the premises he occupies and uses as clean and safe as the condition of the premises permits. Va. Code. Ann. § 1227(A)(2). Va. Code Ann. § 55.1-1227(A)(13) requires the tenant to obey reasonable rules and regulations of the landlord.

The Supreme Court of Virginia has recognized additional statutorily-created duties with respect to mold remediation: "Code § 8.01-226.12(E) contemplates that the landlord and/or the managing agent can be held liable for failing to satisfy its statutory obligation to perform proper mold remediation when visible mold has occurred," though "[a]t common law, the landlord had no such responsibility" and the statute thus "clarifies immunities and creates new obligations for the landlord." *Cherry v. Lawson Realty Corp., 295 Va. 369, 377–78, 812 S.E.2d 775, 779 (2018)*; Va. Code Ann. § 8.01-226.12(E).

☞ ***PRACTICE POINTER:*** For the landlord's liability for injuries occurring in common areas, see Instruction No. 24.010. "The duties and liabilities of the landlord to the guests and invitees of the tenant, with respect to personal injuries, are ordinarily the same as those which the landlord owes to the tenant. They stand in the tenant's shoes." *Oliver v. Cashin, 192 Va. 540, 543, 65 S.E.2d 571, 572 (1951).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

## Instruction No. 24.010
## Landlord's Duty to Maintain Common Areas

**A landlord has a duty to a tenant to use ordinary care to keep common areas in a** [reasonably safe condition; clean condition; structurally safe condition]**. Common areas are those parts of the premises over which the landlord retains control and which may be used by all of the tenants.**

**If a landlord fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 55.1-1220(A)(3), 55.1-1259 (enforcement).

**CASE AUTHORITY:** *Gulf Reston, Inc. v. Rogers, 215 Va. 155, 157, 207 S.E.2d 841, 844 (1974)*; *Taylor v. Virginia Constr. Corp., 209 Va. 76, 79–80, 161 S.E.2d 732, 734–35 (1968)*; *Paytan v. Rowland, 208 Va. 24, 26–27, 155 S.E.2d 36, 37–38 (1967)*; *Revell v. Deegan, 192 Va. 428, 433, 65 S.E.2d 543, 546 (1951).*

## PRACTICE COMMENTARY

The common law requires landlords to keep common areas in a "reasonably safe condition." *Gulf Reston, Inc. 215 Va. at 157, 207 S.E.2d at 844.* This has been expanded by Va. Code Ann. § 55.1-1220(A)(3) to require landlords to also keep common areas in a "clean and structurally safe condition." The appropriate words within the brackets should be selected to fit the evidence of the case.

The landlord's duty to the tenant extends to all members of the household. The landlord's duty to the tenant may also apply to tenant's invitees and licensees. *Oliver v. Cashin, 192 Va. 540, 543, 65 S.E.2d 571, 572 (1951).*

The landlord's duty to maintain the premises cannot be delegated to an independent maintenance contractor. *Love v. Schmidt, 239 Va. 357, 360–61, 389 S.E.2d 707, 709 (1990).* See *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 688, 594 S.E.2d 908, 912 (2004).*

For the liability of the landlord for injuries occurring in areas where the tenant has control, see Practice Commentary to Instruction No. 24.000.

Va. Code Ann. § 55.1-1220 imposes distinct duties upon landlords with regard to the premises and the common areas. The statute requires landlords to keep "the premises in a fit and habitable condition." Common areas must be kept "in a clean and structurally safe condition."

If the landlord made a careful inspection of the premises and the inspection failed to disclose a defect, this may be a defense. *Revell v. Deegan, 192 Va. at 434, 65 S.E.2d at 546.*

A tenant plaintiff must have been using the premises in an ordinary way. *Wagman v. Boccheciampe, 206 Va. 412, 416, 143 S.E.2d 907, 909 (1965).*

As a general rule, a landlord does not owe a duty to protect his tenant from a criminal act by a third person. *Gulf Reston, Inc. 215 Va. at 157, 207 S.E.2d at 844.* Exceptions to the general rule occur where a "special relationship" (such as innkeeper-guest or business proprietor-invitee) or a statutory duty exists. See *Taboada v. Daly Seven, Inc., 271 Va. 313, 324, 626 S.E.2d 428, 433 (2006)* (discussing innkeepers' duties to guests); *Wright v. Webb, 234 Va. 527, 530–32, 362 S.E.2d 919, 920–21 (1987)* (discussing business proprietors' duties to invitees); *Gulf Reston, Inc., 215 Va. 155, 157–58, 207 S.E.2d 841, 844 (1974).* A landlord-tenant relationship, without more, is not a special relationship giving rise to the duty to protect. *Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 106–07, 540 S.E.2d 134, 139–40 (2001)*; *Klingbeil Mgmt. Group Co. v. Vito, 233 Va. 445,*

*447–48, 357 S.E.2d 200, 201 (1987); Gulf Reston, Inc., 215 Va. 155, 157–58, 207 S.E.2d 841, 844 (1974).*

☞ ***PRACTICE POINTER:*** A tenant using a common area occupies the status of an invitee. *Colonial Natural Gas Co. v. Sayers, 222 Va. 781,784, 284 S.E.2d 599, 601 (1981).*

☞ ***PRACTICE POINTER:*** For the liability of a tenant for indemnity to a landlord under the conditions of a written lease, see *Kings Markets, Inc. v. Yeatts, 226 Va. 174, 182–84, 307 S.E.2d 249, 254–55 (1983).*

☞ ***PRACTICE POINTER:*** For an example of a written lease provision that failed in its attempt to absolve the landlord of liability to the tenant for loss and damage to the property, see *Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 53, 56–57, 671 S.E.2d 143, 144 (2009).* In *Landmark*, the landlord's reasonable steps to cure the defective roof were not sufficient to absolve him from liability where the lease required the landlord to maintain the roof in good repair. *Id. at 56, 671 S.E.2d at 146.*

### ***ALERTS:***

- For an instruction on the duty of a landlord to remove snow and ice after a storm, see Instruction No. 24.030.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16 (3rd ed. 2003).

MICHIE'S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, *"Landlord and Tenant"* (2004).

## Instruction No. 24.020
## Landlord's Liability for Repairs Made

**A landlord who undertakes to make repairs has a duty to a tenant to use reasonable care in making them.**

**If a landlord fails to perform this duty, then he is negligent.**

## Sources & Authority

**Governing Statutes:** See Va. Code Ann. § 55.1-1220.

**Case Authority:** *Steward v. Holland Family Props., LLC, 284 Va. 282, 292, 726 S.E.2d 251, 257 (2012)*; *Sales v. Kecoughtan Hous. Co., 279 Va. 475, 479–480, 690 S.E.2d 91, 93–94 (2010)*; *Holland v. Shively, 243 Va. 308, 311, 415 S.E.2d 222, 224 (1992)*; *Kesler v. Allen, 233 Va. 130, 133, 353 S.E.2d 777, 779–80 (1987)*; *Oden v. South Norfolk Redev. & Housing Auth., 203 Va. 638, 640, 125 S.E.2d 843, 845 (1962)*; *Oliver v. Cashin, 192 Va. 540, 543–44, 65 S.E.2d 571, 573 (1951)*; *Luedtke v. Phillips, 190 Va. 207, 212, 56 S.E.2d 80, 83 (1949)*.

### Practice Commentary

The duty to use reasonable care in making repairs applies whether the repairs are made voluntarily or by agreement. *Oliver, 192 Va. at 543–44, 65 S.E.2d at 573*; *Luedtke, 190 Va. at 212, 56 S.E.2d at 82*. Proof that the repairs were ineffective does not justify an inference that the repairs were negligently made. *Oden, 203 Va. at 640, 125 S.E.2d at 845*. For a discussion of landlord liability for independent contractors' negligence in making repairs, see *Kesler, 233 Va. at 133–34, 353 S.E.2d at 780; Love v. Schmidt, 239 Va. 357, 360–61, 389 S.E.2d 707, 709–10 (1990)*; *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 687, 594 S.E.2d 908, 911 (2004)*.

A tenant seeking to recover from the landlord for injuries sustained as a result of defective repairs undertaken by the landlord bears the burden of proving that the landlord failed to use reasonable care. *Sales, 279 Va. at 479–480, 690 S.E.2d at 93–94*. The fact that a defect remained after the work was done is not alone sufficient to establish the landlord's liability. *Id. at 480, 690 S.E.2d at 94*. However, where the lease establishes a duty to maintain the premises or part of the premises in good repair, a remaining defect may be sufficient to establish the landlord's liability. See *Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 55–56, 671 S.E.2d 143, 144, 146 (2009)*.

☞ ***Practice Pointer:*** Va. Code Ann. § 55.1-1220(A)(2) requires the landlord to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."

The court ruled in *Isbell v. Commercial Inv. Assocs., 273 Va. 605, 611–18, 644 S.E.2d 72, 74–78 (2007)* that the Act imposes only a duty in contract. See *Steward 284 Va. at 288–89, 726 S.E.2d at 255* (the Act imposes contractual duties on landlords, but it does not impose a tort duty to maintain and repair leased premises under the enjoyment and control of the lessee).

### *ALERTS:*

- At common law the landlord has no duty to maintain or repair leased premises. *Steward, 284 Va. at 287–88, 726 S.E.2d at 255* (lease provision whereby landlord retains right to enter the leased premises to inspect and repair did not alter the common law rule regarding a landlord's tort liability); *Wohlford v. Quesenberry, 259 Va. 259, 262, 523 S.E.2d 821, 822 (2000)*.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

## Instruction No. 24.025
## Burden of Proving Landlord's Failure to Exercise Reasonable Care in Making Repairs

**Where the landlord undertakes to make repairs, the tenant has the burden of proving by the greater weight of the evidence that the landlord failed to use ordinary care in making repairs. A showing that a defect remained after repairs were made is by itself insufficient to satisfy this burden.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sales v. Kecoughtan Housing Co., 279 Va. 475, 479–480, 690 S.E.2d 91, 93–94 (2010)*; *Kesler v. Allen, 233 Va. 130, 133, 353 S.E.2d 777, 779–80 (1987)*; *Oden v. South Norfolk Redev. & Housing Auth., 203 Va. 638, 640, 125 S.E.2d 843, 845 (1962)*.

### PRACTICE COMMENTARY

The duty to use reasonable care in making repairs applies whether the repairs are made voluntarily or by agreement. *Oliver v. Cashin, 192 Va. 540, 543–44, 65 S.E.2d 571, 573 (1951)*; *Luedtke v. Phillips, 190 Va. 207, 212, 56 S.E.2d 80, 82 (1949)*. Proof that the repairs were ineffective does not justify an inference that the repairs were negligently made. *Oden, 203 Va. at 640, 125 S.E.2d at 845–46*. For a discussion of landlord liability for independent contractors' negligence in making repairs, see *Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 687, 594 S.E.2d 908, 911 (2004)*; *Love v. Schmidt, 239 Va. 357, 360–61, 389 S.E.2d 707, 709–10 (1990)*; *Kesler, 233 Va. at 133–34, 353 S.E.2d at 780*.

A tenant seeking to recover from the landlord for injuries sustained as a result of defective repairs undertaken by the landlord bears the burden of proving that the landlord failed to use reasonable care. *Sales, 279 Va. at 479–80, 690 S.E.2d at 93–94* . The fact that a defect remained after the work was done is not alone sufficient to establish the landlord's liability. *Id. at 480, 690 S.E.2d at 94*. However, where the lease establishes a duty to maintain the premises or part of the premises in good repair, a remaining defect may be sufficient to establish the landlord's liability. See *Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 55–56, 671 S.E.2d 143, 146 (2009)*.

### *ALERTS:*

- At common law the landlord has no duty to make repairs. *Steward v. Holland Family Props., LLC, 284 Va. 282, 287–88, 726 S.E.2d 251, 257 (2012); Wohlford v. Quesenberry, 259 Va. 259, 262, 523 S.E.2d 821, 822 (2000)*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

## Instruction No. 24.030
## Landlord's Duty to Remove Snow and Ice After Storm

**A landlord has a duty to a tenant to use ordinary care to remove ice or snow from** [outdoor entrance walks; steps; porches; stoops; parking lots] **under his control within a reasonable time after the** [snow; freezing rain] **stops falling.**

**If a landlord fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 55.1-1220.

**CASE AUTHORITY:** *FAD Ltd. P'ship v. Feagley, 237 Va. 413, 415, 377 S.E.2d 437, 438 (1989)*; *Kings Markets, Inc. v. Yeatts, 226 Va. 174, 179–81, 307 S.E.2d 249, 253–54 (1983)*; *Langhorne Rd. Apartments, Inc. v. Bisson, 207 Va. 474, 477, 150 S.E.2d 540, 542 (1966).*

### PRACTICE COMMENTARY

This instruction covers the duty of a landlord to use ordinary care to remove natural accumulations of snow and ice within a reasonable time after the precipitation stops falling. The same duty applies to commercial establishments. See Chapter 23, Owners and Occupants, for the duties of owners or occupants of a private residence.

A landlord "may wait until the end of a storm and a reasonable time thereafter before removing ice and snow from an outdoor entrance, walk, platform or steps." *Amos v. Nationsbank, N.A., 256 Va. 344, 346, 504 S.E.2d 365, 366 (1998).*

Where the injured person is someone other than a tenant or a member of the tenant's family and is an invitee, simply change "landlord" to "occupant" and "tenant" to "invitee."

☞ ***PRACTICE POINTER:*** For in-depth discussions of contributory negligence in premises cases, see *Fultz v. Delhaize Am., Inc., 278 Va. 84, 88–91, 677 S.E.2d 272, 274–76 (2009)*; *Artrip v. E. E. Berry Equip. Co., 240 Va. 354, 358, 397 S.E.2d 821, 823–24 (1990).*

### *ALERTS:*

- *FAD Ltd. P'ship, 237 Va. at 415, 377 S.E.2d at 438*, states that the duty to clear ice and snow does not arise until a reasonable time after the snow and freezing rain has ceased to fall. If there is a dispute as to whether the precipitation had ceased or was still ongoing, the jury must be instructed to resolve the question about the weather conditions.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

## Instruction No. 24.040
## Tenant's Liability for Waste

**A tenant may not commit waste to his landlord's premises.**

**Waste is the** [destruction; material alteration; deterioration beyond normal wear and tear caused] **by the tenant of the landlord's premises.**

**If a tenant commits waste, he is liable to the landlord for damages. The damages for which a tenant is liable are** [the actual reasonable cost of restoring the property to its former condition; the fair and reasonable value of the repairs necessary to restore the property to its former condition; such sum as will be sufficient to compensate the landlord for the injury to the property].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-178.1, 55.1-1227, 55.1-1228.

**CASE AUTHORITY:** *Select Mgmt. Res., LLC v. Runnymede Corp., 273 Va. 710, 714–15, 643 S.E.2d 177, 179 (2007)*; *Chosar Corp. v. Owens, 235 Va. 660, 663, 370 S.E.2d 305, 307 (1988)*; *Kavanaugh v. Donovan, 186 Va. 85, 91–95, 41 S.E.2d 489, 492–94 (1947)*.

### PRACTICE COMMENTARY

In *Chosar Corp., 235 Va. at 663, 370 S.E.2d at 307*, the Supreme Court of Virginia defined "waste":

> Generally, waste is defined as "[a] destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate."

Waste includes work performed on leased premises not authorized by the lease. *Select Mgmt. Res., LLC, 273 Va. at 715, 643 S.E.2d at 179.*

The measure of damages under the Act is set forth in Va. Code Ann. § 55.1-1248. These statutory damages are the first two options (restoration of the property or value of repairs) within the damage brackets of the instruction. The common-law measure of damages is set forth in *Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 723–25, 167 S.E.2d 334, 338–39 (1969)*, and *Vaughan v. Mayo Milling Co., 127 Va. 148, 163–64, 102 S.E. 597, 602 (1920)*. The common-law measure of damages is the first and third option (restoration of the property or sufficient sum to compensate for the injury) within the damage brackets of the instruction.

☞ ***PRACTICE POINTER:*** If the damages to the landlord's premises or property render it a total loss, Instruction No. 9.050 should be modified so that it is applicable to a tenant waste case.

### *ALERTS:*

- Note that Instruction No. 9.050 includes necessary and reasonable expenses incurred as a result of the accident in the measure of damages. The existing case law on waste does not hold that these expenses can be recovered, but it does not exclude it.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, *Landlord and Tenant* §§ 1 through 3, 29 through 39.1

**Instruction No. 24.050**
**Waste: Double Damages**

**A landlord may recover double damages from his tenant if the tenant wantonly committed waste. A tenant wantonly commits waste if:**

**(1) he was conscious of his conduct; and**

**(2) he knew from existing conditions that damage would probably result from his conduct; and**

**(3) he consciously and intentionally, with reckless indifference to the consequences,** [did a wrongful act; omitted a known duty] **that caused injury to the landlord's premises.**

## Sources & Authority

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-178.2, 55.1-1227, 55.1-1228.

***fCASE AUTHORITY:*** *Kavanaugh v. Donovan, 186 Va. 85, 94, 41 S.E.2d 489, 494 (1947).*

### PRACTICE COMMENTARY

For the definition of wanton conduct see *Infant C. v. Boy Scouts of America, Inc., 239 Va. 572, 581, 391 S.E.2d 322, 327 (1990).*

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 16

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.03, 27.08, 27.09, 27.15

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.17, 2.18, 2.27

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 25-4, 27-2, 27-3, 27-5, 27-6, 63-5, 71-2, 71-3, 71-4, 72-2, 74-3

MICHIE'S JURISPRUDENCE, Landlord and Tenant §§ 1 through 3, 29 through 39.1

# Chapter 25

# HOTELS AND MOTELS

**Scope Note**

**Instruction No. 25.000 Duty to Provide Accommodations**

**Instruction No. 25.010 Innkeeper's Duty of Care**

# SCOPE NOTE

These instructions pertain to the duties and liabilities of owners and operators of hotels, motels, inns, and other similar establishments as prescribed by the common law and by Va. Code Ann. § 35.1-28. For convenience, the word "innkeeper" is used in the instructions in this chapter and is intended to be broadly construed so as to include the owners and operators of hotels, motels, inns, and similar establishments that, in exchange for compensation, offer lodging accommodations to the general public. See *Innkeeper*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "innkeeper" as "[s]omeone who, for compensation, keeps open a public house for the lodging . . . of travelers") (citing and quoting JOHN H. SHERRY, THE LAWS OF INNKEEPERS § 2.6, at 15 (rev. ed. 1981)).

Instruction No. 25.000 covers the common law duty of an innkeeper to provide accommodations to whomever requests them, and specifies the grounds upon which an innkeeper may refuse such requests. Instruction No. 25.010 is based on Va. Code Ann. § 35.1-28, which sets out an innkeeper's statutory duty of care. Va. Code Ann. § 35.1-28 also creates somewhat different liabilities and protections for losses of jewelry, money, and valuables of like nature, on the one hand, and baggage, wearing apparel, hats, coats, umbrellas and other accessories, and other property not constituting jewelry, money, and valuables of like nature, on the other. *Id.* The limits on liability vary depending upon whether the loss is from the guest's properly secured room or from the innkeeper's possession. *Id.* The statute also protects the innkeeper from liability when a guest fails to lock his room, and limits liability for guests' belongings lost or destroyed as a result of fire or other overwhelming disasters. *Id.* No instructions are provided concerning these topics.

Va. Code Ann. § 8.01-42.2 provides that a registered guest is civilly liable to the innkeeper "for all property damage to such accommodations or its furnishings which occurs during the period of such person's occupancy when such damage results (i) from the negligence of the guest or of any person for whom he is legally responsible or (ii) from the failure of the guest to comply with reasonable rules and regulations of which he is given actual notice by the innkeeper."

An elevator in a hotel or motel is a conveyance, the operation of which is governed by the law applicable to common carriers. *Murphy's Hotel v. Cuddy's Adm'r, 124 Va. 207, 216–17, 97 S.E. 794, 797 (1919).* See Chapter 22, Common Carriers, for a discussion of the applicable principles and authorities.

## Instruction No. 25.000
## Duty to Provide Accommodations

**An innkeeper has a duty to provide accommodations to all persons who request them, if such accommodations are available, unless his refusal to do so is based on a reasonable ground.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Alpaugh v. Wolverton, 184 Va. 943, 947–48, 36 S.E.2d 906, 907–08 (1946).*

### PRACTICE COMMENTARY

Because of the quasi-public nature of his or her business, an innkeeper cannot arbitrarily refuse to provide any person with accommodations that are available. *Alpaugh, 184 Va. at 947–48, 36 S.E.2d at 907–08.* An innkeeper also cannot arbitrarily refuse to continue providing an existing guest with proper accommodations. *Id.* Note that not every person patronizing or seeking to patronize the facilities of a hotel or motel is a "guest" in the technical sense. *Id. at 948, 36 S.E.2d at 908.* Under Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000, an innkeeper cannot refuse accommodations on the basis of race, color, national origin, or religion. 42 U.S.C. § 2000(a); *Heart of Atlanta Motel v. United States, 379 U.S. 241, 247 (1964).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Hotels, Inns and Restaurants § 5

## Instruction No. 25.010
## Innkeeper's Duty of Care

**An innkeeper has** [a duty to exercise due care and diligence in providing honest and competent employees and to take reasonable precautions to protect his guests and their property; an absolute duty of care to protect his guests when he knows or should know of a danger to them that might easily be [removed; remedied; cured]; a duty of utmost care and diligence to protect his guests against reasonably foreseeable injury from the criminal conduct of a third party]**.**

**If an innkeeper fails to perform** [this duty; these duties]**, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 35.1-28(A).

**CASE AUTHORITY:** *Taboada v. Daly Seven, Inc., 271 Va. 313, 325–26, 626 S.E.2d 428, 434 (2006), aff'd on reh'g, 273 Va. 269, 641 S.E.2d 68 (2007)*; *Kirby v. Moehlman, 182 Va. 876, 884–85, 30 S.E.2d 548, 551 (1944).*

### PRACTICE COMMENTARY

In *Kirby*, the Court held that an innkeeper does not insure his guest's personal safety. *Kirby, 182 Va. at 884, 30 S.E.2d at 551.* His only duty is to use ordinary care and prudence to render the property and fixtures of the hotel, motel, inn or other similar establishment reasonably safe for the use of its guests, unless he knows or should know of a danger which might easily be removed. *Id.* In such case, he has an absolute duty. *Id. at 884–85, 30 S.E.2d at 551* (injuries from a defective chair). Use the second option in the brackets if the evidence supports an instruction on the absolute duty of care of an innkeeper.

An innkeeper and guest possess a special relationship recognized as a matter of law. *Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 107, 540 S.E.2d 134, 139 (2001).* This special relationship between an innkeeper and a guest imposes on the innkeeper a duty of utmost care and diligence to protect the guest against reasonably foreseeable injury from the criminal conduct of a third party. *Taboada, 271 Va. at 325–326, 626 S.E.2d at 434.* Use the third option in the brackets if the evidence supports an instruction on the injury of a guest arising from the criminal conduct of a third party.

An occupier's duty to an invitee does not normally include protection against third-party criminal acts perpetrated against the invitee. *Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 138, 540 S.E.2d 129, 132 (2001)*; *Thompson v. Skate Am., Inc., 261 Va. 121, 128, 540 S.E.2d 123, 127 (2001)*; *Gupton v. Quicke, 247 Va. 362, 363, 442 S.E.2d 658, 658 (1994)*; *Burns v Johnson, 250 Va. 41, 44, 458 S.E.2d 448, 450 (1995)*; *Wright v. Webb, 234 Va. 527, 530–31, 362 S.E.2d 919, 920–21 (1987).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.6, 8.6, 16.4

Kent Sinclair, VIRGINIA REMEDIES, §§ 6-4, 25-8, 27-3

MICHIE'S JURISPRUDENCE, Hotels, Inns and Restaurants §§ 6, 8

# Chapter 26

# NUISANCE

## Scope Note

**Instruction No. 26.000** **Definition of Nuisance**

**Instruction No. 26.010** **Multiple Causes of a Nuisance**

**Instruction No. 26.020** **Definition of Permanent Nuisance**

**Instruction No. 26.030** **Measure of Damages to Property: Permanent Nuisance**

**Instruction No. 26.040** **Measure of Damages to Property: Temporary Nuisance**

# SCOPE NOTE

This chapter covers the definition of a nuisance and the measures of damages to be used in actions for nuisance. Instruction No. 26.000 gives the basic definition of nuisance.

Negligence is a distinct legal concept from nuisance, but negligence is an essential element of nuisance when a municipality is sued for maintaining a nuisance while performing an authorized act. *Breeding v. Hensley, 258 Va. 207, 215, 519 S.E.2d 369, 373 (1999).*

It is not necessary, with one exception, to prove that a nuisance was negligently created to recover damages caused by the nuisance. The one exception is that a person acting in a public capacity is only liable for creating a nuisance if he was negligent in creating the nuisance or in allowing it to exist. *Hawthorn v. City of Richmond, 253 Va. 283, 286, 484 S.E.2d 603, 605 (1997)*; *Chapman v. City of Virginia Beach, 252 Va. 186, 192, 475 S.E.2d 798, 802 (1996)*; *Sam Finley, Inc. v. Waddell, 207 Va. 602, 605–06, 151 S.E.2d 347, 350 (1966)*; *V.N. Green & Co. v. Thomas, 205 Va. 903, 905–06, 140 S.E.2d 635, 637 (1965).* Whether a person is acting in a public or private capacity is a question of law to be decided by the court. *Southern R. Co. v. McMenamin, 113 Va. 121, 128, 73 S.E. 980, 982 (1912).* If public capacity is an issue, the instructions from this chapter will have to be augmented by the appropriate instructions from the chapters on Negligence and Causation. See Chapters 4 and 5.

Whether someone was acting in a public capacity is a different question from whether the nuisance is public or private. The public capacity inquiry is whether one is doing something for the public so as to be protected by the rules that restrict the liability of public bodies. See Chapter 31, Municipal Corporations—General. The distinction between private and public nuisances is discussed below.

A person who creates a nuisance is only liable for the damage caused by the nuisance. Thus, if a number of people create nuisances that damage the plaintiff's property, it is up to plaintiff to prove within a reasonable degree of certainty the amount of damages caused by each defendant. *Smith v. Pittston Co., 203 Va. 711, 715, 127 S.E.2d 79, 82 (1962).* This is reflected in Instruction No. 26.010. In this respect, nuisance law differs from negligence law. Under traditional negligence doctrines, if the plaintiff suffers a single, indivisible injury, or if the negligence of several defendants concurs to cause injury, each defendant is liable for the entire injury that results. Instruction No. 4.020, Definition of Concurring Negligence; and No. 4.025, Single, Indivisible Injury. There is one instance where nuisance law and negligence law overlap: when several people act in concert to cause a nuisance, the normal joint tortfeasor rule applies and each is responsible for the full amount of any indivisible injury. See Practice Commentary to Instruction No. 26.010.

Nuisances are characterized in several ways. One way is to distinguish between public and private nuisances. A public nuisance is one where an indefinite number of people, i.e., the public, is injured. A private nuisance harms a limited number of people. A member of the public who suffers no special damage from a public nuisance cannot sue; the proper remedy is for the public authorities to indict or to sue to abate the nuisance. There is no reason to reflect the public-private distinction in the instructions.

Nuisances also are characterized by duration; i.e., temporary or permanent. The definition of a permanent nuisance is set forth in Instruction No. 26.020, Definition of Permanent Nuisance.

The measure of damages for a temporary nuisance, that is, a nuisance that can be abated, is different from the measure of damages for a permanent nuisance. The measure of damages for a permanent nuisance is the diminution in value of the landowner's property caused by the nuisance, plus damages for the loss of use and enjoyment of his property, if any. *National Energy Corp. v. O'Quinn, 223 Va. 83, 91, 286 S.E.2d 181, 186 (1982).* The measure of damages for a temporary nuisance is the amount that fully and fairly compensates the landowner for the loss of use and enjoyment of his property during the period of time that the nuisance was in existence. See Instruction Nos. 26.030 and 26.040. In either case, if the nuisance endangered life or health, a plaintiff may recover damages for physical and emotional injuries caused by the nuisance. *Bowers v. Westvaco Corp., 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992).* The statute of limitations [applicable to claims for injury to property] operates differently in actions for temporary and permanent nuisances. A temporary nuisance is one that is removable or abatable, and an action for [property] damages can be brought at any time. Damages may be recovered, however, only for the five years preceding the institution of the suit. A permanent nuisance, however, is not removable, and unless the action is brought within five years of the beginning of the nuisance, it is barred. Va. Code Ann. § 8.01-243; *Forest Lakes Cmty. Ass'n v. United Land Corp of Am., 293 Va. 113, 123–25, 795 S.E.2d 875, 881 (2017); G. L. Webster Co. v. Steelman, 172 Va. 342, 364–65, 1 S.E.2d 305, 314 (1939)*; *Worley v. Mathieson Alkali Works, 119 Va. 862, 865–66, 89 S.E. 880, 881 (1916).*

## Instruction No. 26.000
## Definition of Nuisance

**A nuisance is any** [activity; use of one's property] **that** [endangers the life or health of another; interferes with the reasonable and comfortable use of the property of another].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Collett v. Cordovana, 290 Va. 139, 145–46, 772 S.E.2d 584, 587 (2015)*; *Turner v. Caplan, 268 Va. 122, 127, 596 S.E.2d 525, 528 (2004)*; *Martin v. Moore, 263 Va. 640, 648, 561 S.E.2d 672, 678 (2002)*; *Bowers v. Westvaco Corp., 244 Va. 139, 144–45, 419 S.E.2d 661, 665 (1992)*; *City of Virginia Beach v. Murphy, 239 Va. 353, 355, 389 S.E.2d 462, 463 (1990)*; *Foley v. Harris, 223 Va. 20, 27–28, 286 S.E.2d 186, 190 (1982)*; *Newport News v. Hertzler, 216 Va. 587, 592, 221 S.E.2d 146, 150 (1976)*; *Barnes v. Graham Va. Quarries, Inc., 204 Va. 414, 417, 132 S.E.2d 395, 397 (1963)*.

### PRACTICE COMMENTARY

A private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property: (1) by diminishing the value of that property; (2) by continuously interfering with his power of control or enjoyment of that property; (3) by causing material disturbance or annoyance to him in his use or occupation of that property. *Virginian R. Co. v. London., 114 Va. 334, 344–45, 76 S.E. 306, 308 (1912)*. See also *Fancher v. Fagella, 274 Va. 549, 556–57, 650 S.E.2d 519, 523 (2007)* (intruding roots of tree from adjoining property). Nuisance also includes anything that gives offense to the senses or violates the laws of decency. *Turner, 268 Va. at 127, 596 S.E.2d at 528*.

A public nuisance is a condition that is dangerous to the public. *Breeding v. Hensley, 258 Va. 207, 213, 519 S.E.2d 369, 372 (1999)*; *Taylor v. City of Charlottesville, 240 Va. 367, 372, 397 S.E.2d 832, 835 (1990)*. The essential characteristic of a public nuisance as it relates to highways is that it imperils the safety of a highway and is dangerous and hazardous in itself. *Breeding, 258 Va. at 213, 519 S.E.2d at 372*. It may be adjacent to the street without adjoining it.

Operation of a lawful enterprise may constitute a nuisance. *National Energy Corp., 223 Va. at 91, 286 S.E.2d at 186*; *Bowers, 244 Va. at 145, 419 S.E.2d at 665*.

"Encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property." *Cline v. Dunlora South., LLC, 284 Va. 102, 108, 726 S.E.2d 14, 17 (2012)*; *Fancher, 274 Va. at 556, 650 S.E.2d at 522*. However, this principle does not support a duty on the part of a landowner to inspect and cut down sickly trees that have the possibility of falling on a public roadway and inflicting injury. *Cline, 284 Va. at 108–09, 726 S.E.2d at 17*.

☞ ***PRACTICE POINTER:*** As to regulation of a nuisance alleged against a condominium owner by the condominium association, see *Unit Owners Ass'n v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982)*.

### *ALERTS:*

- The discomfort and annoyance caused by a nuisance must be significant and

of "a kind that would be suffered by a normal person in the community." *Foley, 223 Va. at 28, 286 S.E.2d at 190–91*; see also *National Energy Corp., 223 Va. at 85, 286 S.E.2d at 182*. "Even though the term 'nuisance' includes everything that endangers life or health, or obstructs the reasonable and comfortable use of property, not every trifling or imaginary annoyance that may offend the sensibilities of a fastidious person is actionable." *Martin, 263 Va. at 648, 561 S.E.2d at 677*.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 17

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.13, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.30, 3.7

Kent Sinclair, VIRGINIA REMEDIES, Chapter 65

MICHIE'S JURISPRUDENCE, Nuisances §§ 1 through 47

## Instruction No. 26.010
## Multiple Causes of a Nuisance

**If** [the plaintiff; a landowner] **is damaged from a combination of nuisances originating from different sources, the burden is on him to prove by the greater weight of the evidence the amount of his damage caused by** [the; each] **defendant.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hampton Rds Sanitation Dist. v. McDonnell, 234 Va. 235, 241–42, 360 S.E.2d 841, 844–45 (1987)*; *National Energy Corp. v. O'Quinn, 223 Va. 83, 90, 286 S.E.2d 181, 185 (1982)*; *Sam Finley, Inc. v. Waddell, 207 Va. 602, 607, 151 S.E.2d 347, 353 (1966)*; *Smith v. Pittston Co., 203 Va. 711, 715, 127 S.E.2d 79, 82 (1962)*; *Panther Coal Co. v. Looney, 185 Va. 758, 771–72, 40 S.E.2d 298, 304–05 (1946).*

### PRACTICE COMMENTARY

When damages in a nuisance case are occasioned by a combination of causes originating from different sources, the burden is on the plaintiff to show, within a reasonable degree of certainty, the share of his damages that are attributable to the defendant, but absolute certainty in the proof of damages is not required. *National Energy Corp., 223 Va. at 90, 286 S.E.2d at 185.* See also *Sam Finley, Inc., 207 Va. at 610, 151 S.E.2d at 353*; *Smith, 203 Va. at 715, 127 S.E.2d at 82.* In light of these decisions, Instruction Nos. 9.010, Reasonable Proof, and 3.100, Standard of Proof: Definition of Greater Weight of the Evidence, should be given along with this instruction.

☞ ***PRACTICE POINTER:*** If there are multiple defendants at trial, the last phrase of the instruction should read, "caused by each defendant."

### *ALERTS:*

- In nuisance cases there may be joint liability where there is concert of action between the joint contributors to the nuisance. If the contributors act independently, and not in concert, the injured party must apportion his damages between the contributors, unless the independent act of the one sought to be held is sufficient to cause the whole loss. *Sam Finley, Inc., 207 Va. at 610–11, 151 S.E.2d at 353.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 17.

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.13, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.30, 3.7

Kent Sinclair, VIRGINIA REMEDIES, Chapter 65

MICHIE'S JURISPRUDENCE, Nuisances §§ 1 through 47

## Instruction No. 26.020
## Definition of Permanent Nuisance

**A nuisance is permanent if, in the ordinary course of things, it will continue to produce injury.** [A nuisance becomes a permanent nuisance as of the time that it begins to produce the continuing injury.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-243.

**CASE AUTHORITY:** *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 126–27, 795 S.E.2d 875, 882 (2017)*; *G.L. Webster Co. v. Steelman, 172 Va. 342, 363–64, 1 S.E.2d 305, 314 (1939)*; *Worley v. Mathieson Alkali Works, 119 Va. 862, 865–66, 89 S.E. 880, 881 (1916).*

### PRACTICE COMMENTARY

Older cases demonstrate a preference for classifying nuisances as temporary rather than permanent. Compare *G.L. Webster Co., 172 Va. at 362–65, 1 S.E.2d at 313–15*, with *Worley, 119 Va. at 865–66, 89 S.E. at 881* and *Foley v. Harris, 223 Va. 20, 286 S.E.2d 186 (1982)*; *National Energy Corp. v. O'Quinn, 223 Va. 83, 286 S.E.2d 181 (1982)*. For a discussion of these classifications, see *Forest Lakes Cmty. Ass'n, 293 Va. at 126–28, 795 S.E.2d at 882–84.*

☞ ***PRACTICE POINTER:*** The sentence in brackets should be used only when there is an issue about when the cause of action accrued. See *Forest Lakes Cmty. Ass'n., 293 Va. at 126–27, 795 S.E.2d at 882*; *G.L. Webster Co., 172 Va. at 364–65, 1 S.E.2d at 314–15.*

### *ALERTS:*

- A defendant relying on the affirmative defense of the statute of limitations has the burden of proving that the permanent nuisance began producing a continuing injury to the plaintiff's property more than five years before the action was brought. *G.L. Webster Co., 172 Va. at 364–65, 1 S.E.2d at 314–15.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 17

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.13, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.30, 3.7

Kent Sinclair, VIRGINIA REMEDIES, Chapter 65

MICHIE'S JURISPRUDENCE, Nuisances §§ 1 through 47

## Instruction No. 26.030
## Measure of Damages to Property: Permanent Nuisance

**If a nuisance is permanent, the measure of damages to the affected property is the difference between the fair market value of the property** [without; unaffected by] **the nuisance and its fair market value** [with; as affected by] **the nuisance computed at the time the nuisance was created** [commencing on (specify date)]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Packett v. Herbert, 237 Va. 422, 426–27, 377 S.E.2d 438, 442 (1989)*; *Norfolk Cty. Water Co. v. Etheridge, 120 Va. 379, 382, 91 S.E. 133, 134 (1917).*

### PRACTICE COMMENTARY

This instruction is taken primarily from the decision in *Norfolk County Water Co.*

In *Packett*, the Virginia Supreme Court stated that recovery of damages for the permanent diminution in the value of property precludes an injunction against the continued operation of that nuisance. *Packett, 237 Va. at 426–27, 377 S.E.2d at 442.*

### *ALERTS:*

- This instruction only covers damages for the diminution in value of the property caused by the nuisance. In the appropriate case, damages may also be awarded for discomfort and inconvenience caused by material disturbance or annoyance to the plaintiff in his use and enjoyment of the property or loss of use of the property, such as for damages to crops planted before the injurious effects of the nuisance were known, and, if the nuisance endangered the life and health of the plaintiff, for any physical and emotional injuries caused by the nuisance. *Bowers v. Westvaco Corp., 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992)*; *National Energy Corp. v. O'Quinn, 223 Va. 83, 91, 286 S.E.2d 181, 186 (1982)*; *Norfolk Cty. Water Co., 120 Va. at 382, 91 S.E. at 134.* Where there is evidence of such other damage, this instruction should be modified accordingly.

- A permanent nuisance is not removable or abatable. Accordingly, the statute of limitations bars actions for permanent nuisances that are not brought within five years of the injury sustained as a result of the nuisance. Va. Code Ann. § 8.01-243; *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 123–25, 795 S.E.2d 875, 881 (2017)*; *G. L. Webster Co. v. Steelman, 172 Va. 342, 364–65, 1 S.E.2d 305, 314 (1939)*; *Worley v. Mathieson Alkali Works, 119 Va. 862, 865–66, 89 S.E. 880, 881 (1916).* A temporary nuisance, however, is removable or abatable, and an action for damages can be brought at any time, but damages may be recovered only for the five years preceding the institution of the suit. Va. Code Ann. § 8.01-243.

- Abatement of a public nuisance by a municipal body is not a taking for which compensation is due. *Lee v. City of Norfolk, 281 Va. 423, 438–40, 706 S.E.2d 330, 338–39 (2011).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14 & 17

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.13, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.30, 3.7
Kent Sinclair, VIRGINIA REMEDIES, Chapter 65
MICHIE'S JURISPRUDENCE, Nuisances §§ 1 through 47

## Instruction No. 26.040
## Measure of Damages to Property: Temporary Nuisance

**If a nuisance is temporary, the measure of damages is the amount that will fully and fairly compensate the landowner for the loss of use and enjoyment of his property over the period of time the nuisance was in existence** [commencing on (specify date)]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Packett v. Herbert, 237 Va. 422, 426–27, 377 S.E.2d 438, 442–43 (1989)*; *Chesapeake & Ohio Ry. v. Greaver, 110 Va. 350, 356–57, 66 S.E. 59, 61 (1909).*

### PRACTICE COMMENTARY

A temporary nuisance is removable or abatable, and an action for damages can be brought at any time. However, the plaintiff may only recover damages for the five years prior to the commencement of the action. Va. Code Ann. § 8.01-243. The jury generally would not need to be instructed on that point. If evidence is adduced, however, that could confuse the jury as to the time period for which damages may be considered, the instruction may be modified accordingly, e.g., by inserting a specific "starting" date at the end of the instruction.

☞ ***PRACTICE POINTER:*** For cases discussing the differences between the measure of damages in temporary and permanent nuisance cases, *see Forest Lakes Cmty. Ass'n v. United Land Corp., 293 Va. 113, 123–30, 795 S.E.2d 875, 881–85 (2017)* and *Packett, 237 Va. at 426–27, 377 S.E.2d at 442–43.*

### *ALERTS:*

- This instruction only covers damages for the loss of use and enjoyment of the property. If the nuisance endangered the life and health of the plaintiff, damages may also be awarded for physical and emotional injuries caused by the nuisance. *National Energy Corp. v. O'Quinn, 223 Va. 83, 91, 286 S.E.2d 181, 186 (1982)*; *Bowers v. Westvaco Corp., 244 Va. 139, 148, 419 S.E.2d 661, 667 (1992).* In cases where there is evidence that the life and health of a landowner or occupant of the property was endangered, this instruction should be modified accordingly.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13, 14 & 17

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.13, 35.02

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.30, 3.7

Kent Sinclair, VIRGINIA REMEDIES, Chapter 65

MICHIE'S JURISPRUDENCE, Nuisances §§ 1 through 47

# Chapter 27

# TRESPASS



## Scope Note

**Instruction No. 27.000 Definition of Trespass**

**Instruction No. 27.010 Willful or Not Willful**

**Instruction No. 27.020 Presumption of Willfulness**

**Instruction No. 27.040 Damages: Severance of Goods From Land**

# SCOPE NOTE

Instruction No. 27.000 defines "trespass." Instruction No. 27.010 states the difference between a willful trespass and one that is not willful at common law, and Instruction No. 27.020 sets forth the common law presumption that a trespass is willful. Instruction No. 27.040 should be used in common law trespass actions where the trespasser removes goods from the property.

An action for common law trespass to land derives from the general principle of law [that] every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another. *Kurpiel v. Hicks, 284 Va. 347, 353, 731 S.E.2d 921, 925 (2012).*

In order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed. *Id.* In addition, the plaintiff must prove an invasion that interfered with the right of exclusive possession of the land, and that was a direct result of some act committed by the defendant. *Id. at 353–54, 731 S.E.2d at 925.*

The measure of damages for a breach of the implied promise to pay is the fair value of the benefits received by the trespasser. *Id. at 547–48, 39 S.E.2d at 238.*

Damages recoverable for a common law trespass resulting in the unauthorized removal of timber is addressed in *Barnes v. Moore, 199 Va. 227, 98 S.E.2d 683 (1957).* If the cutting of trees is merely inadvertent, or done through mistake under a bona fide claim of right or title, without gross negligence, then a trespasser is only liable for the stumpage value of the trees. However, if the evidence is sufficient to justify the belief that the trespasser's error or mistake was committed in bad faith, or recklessly, or in willful disregard of the rights of others, or induced by his utter failure to do what an ordinary, reasonable, and prudent man would have done, in view of all the surrounding circumstances, then his conduct constitutes gross negligence, and he is liable for its manufactured value. *Id. at 232, 98 S.E.2d at 686.*

Damages recoverable for a trespass resulting in the unauthorized removal of timber are also addressed in Va. Code Ann. §§ 55.1-2835 through 55.1-2841. If the defendant "encroaches and cuts timber," that constitutes statutory trespass resulting in timber cutting. Va. Code Ann. § 55.1-2835. The defendant has the affirmative defense of proving that he acted "prudently and under a bona fide claim of right." *Id.* Damages pursuant to § 55.1-2835 are codified in Va. Code Ann. §§ 55.1-2836. A procedure is established that involves an experienced timber estimator to first determine the value of the timber on the stump, identical to the common law when the trespass was not willful. The statute goes on to permit treble damages of the value of the timber on the stump when the cutting is "without legal right or permission." § 55.1-2836(B). It also permits reforestation costs (not to exceed $450 per acre), costs of ascertaining the value of the timber, any "directly associated legal costs," and reasonable attorney fees. § 55.1-2836(B). See *Chacey v. Garvey, 291 Va. 1, 781 S.E.2d 357 (2015)* (decided prior to statutory change permitting attorney fees) for discussion of directly associated costs.

For statutes addressing liability of owners of animals for trespass, see Va. Code Ann. §§ 55.1-2810 through 55.1-2841.

Virginia law allows the joinder of tort and contract claims, provided that all claims

so joined arise out of the same transaction or occurrence. Va. Code Ann. § 8.01-272. As a result, a plaintiff may be able to assert a cause of action for trespass under both tort and contract and, upon proper proof, have the jury instructed on both types of damages.

Regarding damages for lost profits in an action for trespass, see *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc., 247 Va. 187, 440 S.E.2d 606 (1994).*

Punitive damages may be recovered in an action for trespass where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the property rights of others. *Hamilton Dev. Co. v. Broad Rock Club, Inc., 248 Va. 40, 45, 445 S.E.2d 140, 143 (1994).*

**Instruction No. 27.000**
**Definition of Trespass**

**A trespass is an entry without right or permission, authority or invitation, express or implied, onto property which results in interference with a person's right of possession in the property. Any physical entry upon the property constitutes such a trespass, whether the entry is a walking upon it, flooding it with water, casting objects upon it, or otherwise.**

[A trespass is an intentional failure to leave property after being requested to do so by a person with a right of possession in the property.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Collett v. Cordovana, 290 Va. 139, 145, 772 S.E.2d 584, 587 (2015)*; *Kurpiel v. Hicks, 284 Va. 347, 353–54, 731 S.E.2d 921, 925 (2012)*; *Johnson v. Marcel, 251 Va. 58, 60, 465 S.E.2d 815, 816 (1996)*; *Cooper v. Horn, 248 Va. 417, 423, 448 S.E.2d 403, 406 (1994)*; *Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235, 239–240, 360 S.E.2d 841,843 (1987)*; *Porter v. Wilson, 244 Va. 366, 421 S.E.2d 440 (1992)*; *Mullins v. Greer, 226 Va. 587, 589, 311 S.E.2d 110, 111–112 (1984).*

### PRACTICE COMMENTARY

This instruction should be modified if the trespass alleged was for timber cutting as defined in Virginia Code § 55.1-2835. See *Porter v. Wilson, 244 Va. 366, 421 S.E.2d 440 (1992)* (applying former statute § 55-331).

When Instruction No. 9.010, Reasonable Proof, is given with this instruction, the word "trespass" should be substituted for the word "negligence."

When acts of trespass are not continuous, but occur only at intervals, each occurrence inflicts a new injury and gives rise to a new and separate cause of action. *Robinson v. Nordquist, 297 Va. 503, 830 S.E.2d 36, (2019)*; *McDonnell, 234 Va. at 239, 360 S.E.2d at 843.*

Civil liability may be predicated upon an unintentional trespass, or upon acts done accidently, inadvertently, or by mistake. Although proof of a negligent act may be sufficient to establish a civil action for trespass, such proof is not a necessary element of that cause of action. *Cooper, 248 Va. at 423–424, 488 S.E.2d at 407.*

To establish trespass involving timber cutting, "encroachment" without prudence and bona fide claim of right is sufficient. Va. Code Ann. §§ 55.1-2835; see *Porter, 244 Va. at 371.*

Virginia applies the modified common-law rule to surface water. *Mullins, 226 Va. at 589, 311 S.E.2d at 112.* Surface water is defined as water "diffused over the surface of the ground . . . until it reaches some well-defined channel." *Id.* Under this rule, surface water is a common enemy, and each landowner may fight it off as best he can, provided he does so reasonably and in good faith and not wantonly, unnecessarily, or carelessly. *Kurpiel, 284 Va. at 354–55, 731 S.E.2d at 925*; *Mullins, 226 Va. at 589, 311 S.E.2d at 112.* One exception to the rule prohibits a landowner from injuring another by interfering with the flow of surface water in a natural channel or watercourse which has been worn or cut into the soil. *Id.*

Where the alleged trespass is deliberate and accompanied by aggravating circumstances, damages for emotional distress may be recoverable in the absence of physical injury. *Johnson, 251 Va. at 60, 465 S.E.2d at 817.*

### *ALERTS:*

- The non-bracketed definition should be used when the initial entry is alleged

to be a trespass; the bracketed definition should be used when failure to leave is alleged to be a trespass.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 70-1 through 70-7

MICHIE'S JURISPRUDENCE, Trespass §§ 1 through 26

*Unlawful entry and detainer; Judgment not to bar action of trespass or ejectment.* Va. Code Ann. § 8.01-130

## Instruction No. 27.010
## Willful or Not Willful

**A trespass is willful if it is committed** [in bad faith; with intentional disregard of the rights of another; with gross negligence regarding the rights of another]**. A trespass is not willful if it is committed** [unintentionally; accidentally; inadvertently; by mistake] **under a good faith claim of right.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Barnes v. Moore, 199 Va. 227, 232, 98 S.E.2d 683, 686 (1957)*; *French v. Stange Mining Co., 133 Va. 602, 618–619, 114 S.E. 121, 126 (1922)*; *Wood v. Weaver, 121 Va. 250, 262, 92 S.E. 1001, 1004 (1917).*

### PRACTICE COMMENTARY

This instruction that pertains only to common law trespass should be given in conjunction with Instruction Nos. 27.020, Presumption of Willfulness, and 27.040, Damages: Severance of Goods from Land. This instruction should not be given in actions based solely on Va. Code Ann. § 55.1-2835.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 70-1 through 70-7

MICHIE'S JURISPRUDENCE, Trespass §§ 1 through 26

*Unlawful entry and detainer. Judgment not to bar action of trespass or ejectment.* Va. Code Ann. § 8.01-130

## Instruction No. 27.020
## Presumption of Willfulness

**Every trespass is presumed to be willful. If you find that there was a trespass, the burden of proof is on the defendant, based on all the evidence introduced at trial, to show that the trespass was not willful.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Barnes v. Moore, 199 Va. 227, 228, 98 S.E.2d 683, 684 (1957)*; *Bostic v. Whited, 198 Va. 237, 239, 93 S.E.2d 334, 335–36 (1956)*; *French v. Stange Mining Co., 133 Va. 602, 619, 114 S.E. 121, 126 (1922)*; *Wood v. Weaver, 121 Va. 250, 260, 92 S.E. 1001, 1003 (1917).*

### PRACTICE COMMENTARY

This instruction that pertains only to common law trespass should be given with Instruction No. 27.040, Damages: Severance of Goods from Land, and should follow Instruction No. 27.010, Willful or Not Willful. This instruction should not be given in actions based solely on Virginia Code § 55.1-2835.

***Limitation on evidentiary presumptions in civil cases.*** The compelling reasons for caution where presumptions operate against the accused in a criminal case are not present in civil cases, where the consequences are not matters of liberty or life, are usually financial, and a lighter burden of persuasion is applied. Presumptions in such cases do not violate the Due Process Clause, even though they operate to the benefit of the plaintiff. However, the Supreme Court of Virginia has recognized a requirement that to be valid, the inference drawn by a presumption must be a reasonable one: it must not be in derogation of, nor a stranger to, the evidence from which it allegedly emanates. In other words, the inference must, based on common knowledge and experience, frequently result from the circumstances triggering application of the presumption. See *Virginia Transit Co. v. Schain, 205 Va. 373, 377, 137 S.E.2d 22, 25 (1964)*; *Carter v. Hercules Powder Co., 182 Va. 282, 292, 28 S.E.2d 736, 740 (1944)*; Charles Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-11; see also *Parson v. Miller, 296 Va. 509, 524–528, 822 S.E.2d 169, 178–179 (2018)*; *Kiddell v. Labowitz, 284 Va. 611, 621–28, 733 S.E.2d 622, 627–31 (2012)* (discussing operation of presumptions under Virginia law).

### *ALERTS:*

- This instruction is for those cases in which there is no issue as to whether there was a trespass. If there is an issue as to whether there was a trespass, this instruction must be altered to make clear that the jury should not presume that a trespass is willful until it believes, by the greater weight of the evidence, that there was a trespass.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 70-1 through 70-7

MICHIE'S JURISPRUDENCE, Trespass §§ 1 through 26

*Unlawful entry and detainer. Judgment not to bar action of trespass or ejectment.* Va. Code Ann. § 8.01-130

**Instruction No. 27.040**
**Damages: Severance of Goods From Land**

**If you find by the greater weight of the evidence that the defendant removed the plaintiff's** (specify goods) **from the plaintiff's land without authority, the defendant trespassed and is liable to the plaintiff in damages.**

**If the defendant's act was a willful trespass, the measure of damages is the value of the** (specify goods) **with any increase in their value attributable to the labor of the defendant.**

**If the defendant's act was not a willful trespass, the measure of damages is the value of the** (specify goods) **immediately before they were removed from the land.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 55.1-2835–55.1-2836.

**CASE AUTHORITY:** *Chacey v. Garvey, 291 Va. 1, 8–11, 781 S.E.2d 357, 360–362 (2015)*; *Porter v. Wilson, 244 Va. 366, 421 S.E.2d 440 (1992)*; *Barnes v. Moore, 199 Va. 227, 228, 98 S.E.2d 683, 684 (1957)*; *Bostic v. Whited, 198 Va. 237, 239, 93 S.E.2d 334, 335–36 (1956)*; *Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 547–48, 39 S.E.2d 231, 237–38 (1946)*; *Wood v. Weaver, 121 Va. 250, 258, 92 S.E. 1001, 1003 (1917)*.

## PRACTICE COMMENTARY

This instruction that pertains only to common law trespass should be given in conjunction with Instruction Nos. 27.010, Willful or Not Willful, and 27.020, Presumption of Willfulness. This instruction should not be given in actions based solely on Virginia Va. Code Ann. § 55.1-2835.

If treble damages for loss of timber are being sought under Va. Code Ann. § 55.1-2836, this instruction must be modified.

A person may seek statutory damages pursuant to Va. Code Ann. § 55.1-2836 for the wrongful cutting of timber by another, including three times the value of the timber removed, reforestation costs, the cost of ascertaining the value of the timber, any directly associated legal costs, and reasonable attorney fees incurred by the owner of the timber as a result of the trespass. Va. Code Ann. § 55.1-2836. The person must follow the procedures prescribed by the statutes in order to recover those damages. The treble damages provided by Va. Code Ann. § 55.1-2836 are not favored, as these are in the nature of a penalty. Where the trespasser acts prudently and under a bona fide claim of right, treble damages are not recoverable. Va. Code Ann. §§ 55.1-2835 and 55.1-2836; *Porter v. Wilson, 244 Va. 366, 372, 421 S.E.2d 440 (1992)*. Even if there is no evidence introduced as to stump value under Va. Code Ann. § 55.1-2836, plaintiff is still permitted to recover other damages under this statute. See *Chacey, 291 Va. at 8–11, 781 S.E.2d at 360–62*.

☞ ***PRACTICE POINTER:*** For a case regarding damages for lost profits in an action for trespass, see *Hop-In Food Stores v. Serv-N-Save, 247 Va. 187,190, 440 S.E.2d 606 (1994)*.

## *ALERTS:*

None.

## *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 27.13, 27.14

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 3.2, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 70-1 through 70-7

MICHIE'S JURISPRUDENCE, Trees and Timber §§ 20 through 26; Trespass §§ 1 through 26

# Chapter 28

# BAILMENTS

## Scope Note


**Instruction No. 28.000** **Definition of "Bailment," "Bailor" and "Bailee"**

**Instruction No. 28.010** **Bailee's Duty: Mutual Benefit Bailment**

**Instruction No. 28.020** **[RESERVED]**

**Instruction No. 28.030** **Bailee's Duty: Gratuitous Bailment**

**Instruction No. 28.040** **Bailor's Duty: Bailment for Hire or Mutual Benefit**

**Instruction No. 28.060** **Bailee's Negligence Not Imputed to Bailor**

**Instruction No. 28.070** **Issues and Allocation of Burdens of Proof: Contract**

**Instruction No. 28.071** **Issues and Allocation of Burdens of Proof: Tort**

**Instruction No. 28.080** **Finding Instruction: Contract**

**Instruction No. 28.081** **Finding Instruction: Tort**

# SCOPE NOTE

These instructions cover three aspects of the law of bailments: the bailee's liability to the bailor for loss of or damage to the bailed object; the bailor's liability to the bailee; and insulation from liability for the acts of the bailee involving the bailed object.

Instruction No. 28.000 defines "bailment," "bailor" and "bailee." The subsequent instructions state the bailee's duty to the bailor in each of the three types of bailments: bailments for the mutual benefit of the bailor and bailee (Instruction No. 28.010); and bailments for the bailor alone, or gratuitous bailments (Instruction No. 28.030).

One instruction on a bailor's duties is offered: No. 28.040 covers the bailor's duty to the bailee in a mutual-benefit/for hire bailment. No instructions on the bailor's duty to the bailee are offered where the bailment is for the bailor's or bailee's sole benefit.

If the putative bailee injures a third party with the bailed object (usually an automobile), the injured person may sue the bailor and allege that he is liable because he is the principal and the bailee is his agent. If the bailor provides proof that the arrangement is a bailment and not an agency, then he is entitled to an instruction that the bailee's negligence cannot be imputed to him. This situation is covered in Instruction No. 28.060. Cf. Chapter 8, Agency and Similar Relationships.

This chapter concludes with two issues and allocation-of-burdens-of-proof instructions and two corresponding finding instructions. Instruction No. 28.070 sets out the issues and burden of proof for contract claims in a bailment case, and Instruction No. 28.071 sets out the issues and burden of proof for tort claims in a bailment case. Instruction No. 28.080 is the finding instruction that corresponds to the contract issues and burden-of-proof instruction, and Instruction No. 28.081 is the finding instruction that corresponds to the tort issues and burden-of-proof instruction.

## Instruction No. 28.000
## Definition of "Bailment," "Bailor" and "Bailee"

**A bailment is the delivery of personal property by one person, called the "bailor," to another, called the "bailee," by way of loan, rental or other entrustment, for some purpose which is of benefit to one or both of them.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Gasque v. Mooers Motor Car Co., 227 Va. 154, 161, 313 S.E.2d 384, 389 (1984)*; *Morris v. Hamilton, 225 Va. 372, 374–75, 302 S.E.2d 51, 52–53 (1983)*; *K-B Corp. v. Gallagher, 218 Va. 381, 384, 237 S.E.2d 183, 185 (1977)*; *Crandall v. Woodard, 206 Va. 321, 327, 143 S.E.2d 923, 927 (1965).*

### PRACTICE COMMENTARY

This instruction should be used whenever a general definition of bailment is necessary. The court in *Crandall, 206 Va. at 327, 143 S.E.2d at 927,* adopted a definition of bailment almost verbatim from Black's Law Dictionary, 4th Ed., at page 179. The definition of bailment in this instruction paraphrases that definition.

This definition is general. Although a bailment usually requires a delivery by the bailor and an acceptance by the bailee, this is not always the case. A bailment may arise where there has been no such ceremony. *K-B Corp, 218 Va. at 384, 237 S.E.2d at 185.* The essential elements of a bailment are lawful possession in the bailee, however created (actual or constructive acceptance), and a duty to account for the property of another. *Crandall, 206 Va. at 327, 143 S.E.2d at 927.* For example, after giving notice of revocation, a buyer holds goods as bailee for the seller. The buyer cannot continue to use the goods as his own and still have the benefit of rescission. *Gasque, 227 Va. at 161, 313 S.E.2d at 389.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.010
## Bailee's Duty: Mutual Benefit Bailment

**If the bailment is for the mutual benefit of the bailor and the bailee, then the bailee has a duty to use ordinary care for the protection, preservation and return of the bailed property.**

**If the bailee fails to perform this duty, then he is liable for any loss or damage to the property that is caused by his failure.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 91, 387 S.E.2d 763, 766 (1990)*; *Tidewater Stevedore Co. v. Lindsay, 136 Va. 88, 99–100, 116 S.E. 377, 380 (1923).*

### PRACTICE COMMENTARY

Where a bailment is for hire or for the mutual benefit of the parties, the bailee is not an insurer of the property and cannot be held to answer for loss or damage to the property unless it is his fault. A bailee for hire is only obliged to take ordinary care of the property and is liable only if the loss is the result of his negligence. *Tidewater Stevedore Co., 136 Va. at 99, 116 S.E.2d at 380.* See *Volvo, 239 Va. at 91–93, 387 S.E.2d at 766–67,* for a discussion of jury instructions when the cause of action is based upon contract and tort.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.020
## [RESERVED]

## Instruction No. 28.030
## Bailee's Duty: Gratuitous Bailment

**If the bailment is for the benefit of the bailor alone, then the bailee has a duty to the bailor to use only slight care or diligence for the protection, preservation and return of the bailed property.**

**If he fails to perform this duty, then he is liable for any loss or damage to the property caused by his failure.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Morris v. Hamilton, 225 Va. 372, 375, 302 S.E.2d 51, 53 (1983)*; *Dawson v. Fusco's Auto Serv., 178 Va. 350, 353, 17 S.E.2d 364, 365 (1941)*; *Jones v. Massie, 158 Va. 121, 125, 163 S.E. 63, 64 (1932)*; *Tancil v. Seaton, 69 Va. (28 Gratt.) 601, 606 (1877).*

### PRACTICE COMMENTARY

The Court has used the concept of gross negligence to define the bailee's duty. See *Morris, 225 Va. at 375, 302 S.E.2d at 53*. See also Instruction No. 4.030, Definition of Gross Negligence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.040
## Bailor's Duty: Bailment for Hire or Mutual Benefit

**If the bailment is for the mutual benefit of the bailor and bailee, then the bailor has a duty to use ordinary care to see that the property bailed is reasonably fit for the purpose for which it would normally be used or for which the bailor was aware that it was intended to be used.**

**If the bailor fails to perform this duty, and if that failure caused the injury complained of, then the bailor is liable.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Smith v. Alexandria Arena, Inc., 294 F. Supp. 695, 697 (E.D. Va. 1969).*

### PRACTICE COMMENTARY

A bailment for the mutual benefit of the parties creates an implied warranty, similar to the warranty that arises with a sale of goods, that the bailed goods are reasonably fit for the purpose for which they are intended. *Smith, 294 F. Supp. at 697.* In holding for the plaintiff-bailee, the court concluded that the plaintiff had carried the burden of proving breach by the defendant-bailor of an implied warranty (of fitness of skates) and the negligence of the bailor's employees in failing to properly inspect the skates furnished to the plaintiff-bailee. *Id.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.060
## Bailee's Negligence Not Imputed to Bailor

**If you find that** (name of bailor) **was a bailor, then he is not liable for the negligence, if any, of** (name of bailee).

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *U-Run-It Co. v. Merryman, 154 Va. 467, 473, 153 S.E. 664, 666 (1930)*; *Green's Ex'rs v. Smith, 146 Va. 442, 451–52, 131 S.E. 846, 848 (1926)*; *Jarvis v. Wallace, 139 Va. 171, 176, 123 S.E. 374, 375 (1924)*; *Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 660–61, 91 S.E. 632, 633–34 (1917)*.

### PRACTICE COMMENTARY

This instruction can also be used when there is an issue as to whether there is a bailment relationship at all, see *U-Run-It Co., 154 Va. at 473, 153 S.E.2d at 666*, or where there is an issue of whether the relationship is one of agency or bailment. See *Jarvis, 139 Va. at 175–76, 123 S.E. at 375*. In either event, it will be necessary to instruct the jury which party has the burden of proving the existence of the bailment relationship. See Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.070
## Issues and Allocation of Burdens of Proof: Contract

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues** [on the contract claim] **in this case are:**

(1) **Did** (name of bailor) **deliver a** (name bailed object) **to** (name of bailee) **under a bailment agreement?**

(2) **Did** (name of bailee) **fail to redeliver the** (name bailed object) **on demand or as agreed?**

**On these issues** (name of bailor) **has the burden of proof.**

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(3) **Was the** (name bailed object) [lost; destroyed; damaged; taken out of his possession] **without the fault of** (name of bailee)**?**

**On this issue** (name of bailee) **has the burden of proof.**

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(4) **If** (name of bailor) **is entitled to recover, what is the amount of his damages?**

**On this issue** (name of bailor) **has the burden of proof.**

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**Your decision on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 91–92, 387 S.E.2d 763, 766 (1990)*; *Canty v. Wyatt Storage Corp., 208 Va. 161, 162–64, 156 S.E.2d 582, 583–84 (1967)*; *Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 234–36, 64 S.E.2d 671, 673–74 (1951).*

### PRACTICE COMMENTARY

Quite often delivery and failure to return are not in issue. If not, this instruction should be altered so that the jury is instructed only upon those issues that it needs to decide.

☞ ***PRACTICE POINTER:*** If affirmative defenses are not presented, subparagraph (3) and the sentence following it should be deleted.

### *ALERTS:*

- One must determine whether the action is in contract or tort, or both. Where the bailor relies upon the ordinary contract of bailment without predicating his right of recovery upon the bailee's failure to exercise due care, the bailor makes out a prima facie case when he shows delivery of the article to the bailee and the latter's failure to return it on demand or as agreed upon. The bailee may escape liability by showing that the property was lost or destroyed without his fault, but this is an affirmative defense which he must prove. *Volvo, 239 Va. at 92, 387 S.E.2d at 766; Canty, 208 Va. at 162–63, 156 S.E.2d at 583.*

- In order to account for the two potential theories of recovery, separate issue and finding instructions for contract claims (Instruction No. 28.070, Issues and Allocation of Burdens of Proof: Contract; Instruction No. 28.080, Finding Instruction: Contract) and tort claims (Instruction No. 28.071, Issues and Allocation of Burdens of Proof: Tort; Instruction No. 28.081, Finding Instruction: Tort) are provided. The pleadings and the evidence will dictate the appropriate instruction(s) to be used.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24: Contract Actions

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

## Instruction No. 28.071
## Issues and Allocation of Burdens of Proof: Tort

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues** [on the tort claim] **in this case are:**

(1) **Did** (name of bailor) **deliver a** (name bailed object) **to** (name of bailee) **under a bailment agreement?**

(2) Was any damage to [loss of; destruction of] (name bailed object) **proximately caused by the negligence of** (name of bailee)**?**

(3) If (name of bailor) **is entitled to recover, what is the amount of his damages?**

**On these issues** (name of bailor) **has the burden of proof.**

**Your decision on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 91–92, 387 S.E.2d 763, 766 (1990)*; *Canty v. Wyatt Storage Corp., 208 Va. 161, 163–64, 156 S.E.2d 582, 584 (1967)*; *Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 234–36, 64 S.E.2d 671, 673–74 (1951).*

### PRACTICE COMMENTARY

Quite often delivery and failure to return are not in issue. If not, this instruction should be altered so that the jury is instructed only upon those issues that it needs to decide.

Conceivably, contributory negligence might be an issue. If so, it should be set forth in both the issue and the finding instructions. See Instruction No. 6.000, Definition of Contributory Negligence.

### *ALERTS:*

- If there is a tort count, the burden of proof on that count remains upon the plaintiff throughout the case. If the bailor proves that the property was returned damaged in such a way as does not usually occur by the exercise of proper care, then a presumption of negligence on the bailee arises and shifts the burden of going forward with the evidence to the bailee. This, however, does not require the bailee to prove that he was not negligent. *Volvo, 239 Va. at 91–92, 387 S.E.2d at 766.*

- In order to account for the two potential theories of recovery, separate issue and finding instructions for contract claims (Instruction No. 28.070, Issues and Allocation of Burdens of Proof: Contract; Instruction No. 28.080, Finding Instruction: Contract) and tort claims (Instruction No. 28.071, Issues and Allocation of Burdens of Proof: Tort; Instruction No. 28.081, Finding Instruction: Tort) are provided. The pleadings and the evidence will dictate the appropriate instruction(s) to be used.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

**Instruction No. 28.080**
**Finding Instruction: Contract**

**You shall find your verdict for the bailor if he proved by the greater weight of the evidence:**

(1) **that he delivered a** (name bailed object) **to the bailee under a contract of bailment; and**

(2) **that the bailee failed to redeliver it on demand or as agreed upon.**

**You shall find your verdict for the bailee:**

(1) **if the bailor failed to prove either or both of the elements above** [or]

(2) if the bailee proved by the greater weight of the evidence that the (name bailed object) was [lost; destroyed; damaged; taken out of his possession] without the fault of (name of bailee)].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 91–92, 387 S.E.2d 763, 766 (1990)*; *Canty v. Wyatt Storage Corp., 208 Va. 161, 162–64, 156 S.E.2d 582, 583–84 (1967)*; *Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 234–36, 64 S.E.2d 671, 673–74 (1951).*

### PRACTICE COMMENTARY

If an affirmative defense is not presented, the second paragraph of the instruction will be: "You shall find your verdict for the bailee if the bailor failed to prove either or both of the elements above."

### *ALERTS:*

- The warehouseman's lien sections of Va. Code Ann. §§ 8.7-102(1), 8.7-209, 8.7-210 and 8.7-403(1), do not control the burden-of-proof and burden-of-production questions; common law does. *Canty, 208 Va. at 164, 156 S.E.2d at 584.* See Alert to Instruction No. 28.070, Issues and Allocation of Burdens of Proof: Contract, for a discussion of contract and tort claims in bailment cases. See also Instruction No. 28.071.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

**Instruction No. 28.081**
**Finding Instruction: Tort**

**You shall find your verdict for the bailor if he proved by the greater weight of the evidence:**

(1) **that he delivered a** (name bailed object) **to the bailee under a contract of bailment; and**

(2) **that the damage to** [loss of; destruction of] (name bailed object) **was proximately caused by the negligence of** (name of bailee)**.**

**You shall find your verdict for the bailee if the bailor failed to prove either or both of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None; see Alert.

**CASE AUTHORITY:** *Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 91–92, 387 S.E.2d 763, 766 (1990)*; *Canty v. Wyatt Storage Corp., 208 Va. 161, 162–64, 156 S.E.2d 582, 583–84 (1967)*; *Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 234–36, 64 S.E.2d 671, 673–74 (1951).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- The warehouseman's lien sections of Va. Code Ann. §§ 8.7-102(1), 8.7-209, 8.7-210 and 8.7-403(1), do not control the burden-of-proof and burden-of-production questions; common law does. *Canty, 208 Va. at 164, 156 S.E.2d at 584.* See Alert to Instruction No. 28.071, Issues and Allocation of Burdens of Proof: Tort, for a discussion of contract and tort claims in bailment cases. See also Instruction No. 28.070.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 4-20

Kent Sinclair, VIRGINIA REMEDIES § 7-1 through 7-11

MICHIE'S JURISPRUDENCE, Bailments §§ 1 through 21

# Chapter 29

# ANIMALS

## Scope Note


**Instruction No. 29.000** **Owner's Duty: Cattle, Horses, and Other Domestic Farm Animals**

**Instruction No. 29.010** **Owner Charged With Knowledge of Propensities of the Breed**

**Instruction No. 29.020** **Dog Owner's Duty: No Leash Ordinance**

**Instruction No. 29.030** **Owner's Duty: Wild Animals**

**Instruction No. 29.040** **Wild Animals: Contributory Negligence**

# SCOPE NOTE

There are two usual ways that animals implicate their owners in litigation: they trespass on someone else's land and cause property damage or they cause personal injuries. When an animal causes property damage, liability may depend on the type of animal involved, and whether the damage was done in a "fence-out" area or a "no-fence" area. These two aspects are discussed in detail below. When an animal causes personal injuries and the injuries occur off of the animal owner's property, the owner's liability will be governed by general negligence law concepts. If the injuries occur on the animal owner's property, it is still treated as a negligence case, and the owner's liability will be governed by general negligence concepts and by owner's and occupant's liability concepts. See Chapters 3–9 for general negligence instructions and Chapter 23 for "Owners and Occupants" instructions.

With regard to property damage, at common law the owner had a duty to fence in his farm animals; he was liable for the damage they caused if they escaped. *Tate v. Ogg, 170 Va. 95, 101, 195 S.E. 496, 498 (1938).* Virginia modified this rule by several statutory provisions: Va. Code Ann. §§ 55.1-2809, 55.1-2810, 55.1-2814, 55.1-2820, and 55.1-2834. Va. Code Ann. § 55.1-2809 defines what a lawful fence is. Va. Code Ann. § 55.1-2810 states that the owner or manager of "livestock domesticated by man" is liable for actual damages caused if the animal breaks into an area enclosed by a lawful fence. The section also provides for and caps punitive damages and allows double damages for succeeding trespasses. *Id.* These statutes are collectively understood as requiring a landowner to have fenced out animals before he can recover damages and are referred to as a "fence-out" rule. *Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 427, 404 S.E.2d 48, 48–49 (1991).*

There are four additional facets to Virginia's rule. First, even though Virginia's statute eliminates the duty to fence all animals in, an animal owner may be liable if he does not use ordinary care in managing his land and animals to prevent them from straying onto a public highway, where they might cause an injury to persons or property. *Rice v. Turner, 191 Va. 601, 605–06, 62 S.E.2d 24, 26 (1950).* It is not clear, beyond the context of public highways, to what degree the owner of an animal must exercise ordinary care to prevent injury to others.

Second, Virginia has a "no-fence" law. Va. Code Ann. §§ 55.1-2814; 55.1-2827. This law allows a county the option of making property boundary lines equivalent to a lawful fence. Va. Code Ann. § 55.1-2814. In counties that have taken the option and passed a no-fence ordinance that complies with the statute, an animal owner who allows his animals to stray over another's property lines is liable for any damages done by the animal. Va. Code Ann. §§ 55.1-2820, 55.1-2834.

Third, these rules apply only to livestock domesticated by man. Va. Code Ann. §§ 55.1-2810, 55.1-2827. Fowl are governed by common law rules in Virginia; they must be fenced in. *Tate, 170 Va. at 104, 195 S.E. at 500.*

Fourth, these rules apply only in counties; they do not apply within cities and towns. See Va. Code Ann. § 55.1-2810; 55.1-2834. Presumably, in urban areas domesticated livestock must be fenced in, if allowed at all.

The rules settling liability for animal-caused personal injury are somewhat more

straightforward. If a domestic animal injures a person who is not on the owner's property, the issues are those of any other negligence case: whether the owner was negligent and whether his negligence, if any, was a proximate cause of the injury. See Chapters 3–9 for appropriate general negligence instructions. There are only two specialized considerations that are the subject of separate instructions here. First, the animal owner does not need to have actual knowledge that the animal is likely to injure someone: he is charged with knowledge of the propensities of the breed and the specific animal and is liable for any propensities that he ought, by the exercise of ordinary care, to have been aware of. See Instruction No. 29.010, Owner Charged With Knowledge of Propensities of the Breed. Second, localities may enact leash laws. Va. Code Ann. §§ 3.2-6538; 3.2-6543. If a dog is loose in violation of such an ordinance and the dog bites someone, the owner may be liable even though there was no reason for the owner to know that the dog was likely to bite. See Instruction No. 29.020, Dog Owner's Duty: No Leash Ordinance. A dog owner is also liable by statute for livestock and poultry that his dog kills. Va. Code Ann. § 3.2-6553. Pursuant to Va. Code Ann. § 3.2-6542, Virginia has established a searchable Dangerous Dog Registry, which is free to access. Virginia Dep't of Agriculture, The Virginia Dangerous Dog Registry, https://dd.va-vdacs.com/.

When an animal causes personal injuries on the owner's property, it is still treated as a negligence case. In addition, principles pertaining to the liability of property owners and occupants apply. See Chapter 23, Owners and Occupants, as well as the general negligence chapters, Chapters 3–9.

Instruction No. 29.030, Owner's Duty: Wild Animals, covers the duty of care for owners of wild animals, and Instruction No. 29.040, Wild Animals: Contributory Negligence, sets forth the contributory negligence standard in that situation.

## Instruction No. 29.000
## Owner's Duty: Cattle, Horses, and Other Domestic Farm Animals

**The owner of a** [cow; horse; (name of other domestic farm animal)] **has a duty to use ordinary care to keep it from** [straying onto a public highway; breaking into an area enclosed by a lawful fence]**.**

**If an owner fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 55.1-2810; 55.1-2820; 55.1-2834.

**CASE AUTHORITY:** *Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 427, 404 S.E.2d 48, 48–49 (1991)*; *Page v. Arnold, 227 Va. 74, 80, 314 S.E.2d 57, 61 (1984)*; *Wilkins v. Sibley, 205 Va. 171, 173, 135 S.E.2d 765, 766 (1964)*; *Perlin v. Chappell, 198 Va. 861, 864, 96 S.E.2d 805, 808 (1957)*; *Rice v. Turner, 191 Va. 601, 605, 62 S.E.2d 24, 26 (1950)*; *Tate v. Ogg, 170 Va. 95, 102–03, 195 S.E. 496, 499 (1938)*; *Poindexter v. May, 98 Va. 143, 34 S.E. 971, 973 (1900)*.

### PRACTICE COMMENTARY

This instruction applies to livestock or other domestic farm animals. It does not apply to dogs, cats, and similar domestic animals because, unless there is a statute or an ordinance that prohibits their running free or, alternatively, a reason to believe a particular animal of these types is vicious, there is no breach of duty in letting it go at large. *Butler v. Frieden, 208 Va. 352, 354, 158 S.E.2d 121, 123 (1967)*. See also the Alerts, *below* for a note on potential confusion of terminology.

### *ALERTS:*

- Although the owner of livestock is not required to fence the animals in, he is required to use ordinary care to prevent the animals from straying onto a public highway where they might cause injury to others and damage vehicles. *Page, 227 Va. at 80, 314 S.E.2d at 61*.

- Landowners must protect their crops against trespassing cattle by erecting fences. Livestock owners are not required to enclose their land and generally are not liable for damage caused by their trespassing animals unless they go upon land enclosed by a lawful fence. *Holly Hill Farm Corp., 241 Va. at 427, 404 S.E.2d at 48–49*.

- It is important to note that some of the case law, including *Page*, uses the term "domestic animals" in the context of livestock (i.e., cattle, horses, etc.) and not in the context of dogs, cats, and the like, as would otherwise be consistent with the term's ordinary meaning. *Page, 227 Va. at 80, 314 S.E.2d at 61* ("Under present-day conditions, the owner of domestic animals must exercise reasonable care to keep them off public highways."). This language should not be construed as imposing the same duty on common household pets that this instruction imposes on owners of livestock or similar farm animals. *Page* itself dealt with a pony, and *Rice, 191 Va. at 605, 62 S.E.2d at 26*, to which *Page* refers, involved a cow. With regard to dogs, cats, and other similar domestic animals, *Butler, 208 Va. 352, 158 S.E.2d at 121*, provides the controlling rule of law. Accordingly, for clarity, this instruction employs the term "domestic farm animals." When giving this instruction, it is recommended that caution be exercised so as to avoid potential confusion of terminology.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.5, 27.1

Kent Sinclair, VIRGINIA REMEDIES §§ 27-1, 70-2
MICHIE'S JURISPRUDENCE, Animals §§ 1 through 9; 16 through 26

## Instruction No. 29.010
## Owner Charged With Knowledge of Propensities of the Breed

**The owner of a** [breed; class; species] **of animal must take notice of the general, natural inclinations or characteristics of the** [breed; class; species] **of that animal. The owner must also take notice of the inclinations or characteristics peculiar to the animal that he knows about or should have known about. If any of those inclinations or characteristics are of a kind likely to cause injury, the owner has a duty to use ordinary care to prevent any reasonably foreseeable injury.**

**If an owner fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Stout v. Bartholomew, 261 Va. 547, 557–58, 544 S.E.2d 653, 658–59 (2001)*; *Bradshaw v. Minter, 206 Va. 450, 455–56, 143 S.E.2d 827, 830–31 (1965)*; *Perlin v. Chappell, 198 Va. 861, 865, 96 S.E.2d 805, 809 (1957)*; *Panorama Resort v. Nichols, 165 Va. 289, 296–97, 182 S.E. 235, 238–39 (1935).*

### PRACTICE COMMENTARY

This instruction applies even when the animals are on the owner's property. *Panorama Resort, 165 Va. at 296–97, 182 S.E. at 238–39.* This instruction on knowledge of a breed's or a particular animal's propensities will usually be used with Instruction No. 29.000 and other negligence instructions. Although this instruction is designed to apply to cases where there is evidence of general propensities of a class or species of the animal as well as evidence of the propensities of a particular animal, most cases will probably involve only one of these types of situations. The instruction should be adjusted accordingly.

In *Stout, 261 Va. at 557–58, 544 S.E.2d at 658–59*, the court held that the defendant was not unreasonable in relying on an invisible fence, or shock collar, to confine his dog because there was no evidence that the invisible fence was not working properly or that the dog had the propensity to attack. *Bradshaw* involved a high-spirited horse that had injured one of the defendant's social guests. In that case, knowledge of the horse's propensity for injury to others was charged to the defendant. *206 Va. at 455–56, 143 S.E.2d at 830–31.*

As the Supreme Court stated in *Perlin*, "[t]he owner or keeper of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and also of any particular propensities peculiar to the animal itself of which he has knowledge or is put on notice; and in so far as such propensities are of a nature likely to cause injury he must exercise reasonable care to guard against them and to prevent injuries which are reasonably to be anticipated from them." *198 Va. at 865, 96 S.E.2d at 809. Perlin* involved a particular breed of cattle, the Brahma. This breed is easily frightened or excited and has the propensity to jump—even over relatively high fences—and cause injury. As such, the Court held that its owner should have been aware of its general propensities and guarded against them accordingly. *Id.*

In *Panorama Resort*, a case involving a bear in captivity, the Supreme Court of Virginia declined to follow absolute liability doctrines and articulated negligence as the proper standard of liability, including knowledge of propensity and use of ordinary care, or even heightened care, to prevent injury. *165 Va. at 296–97, 182 S.E. at 238–39.*

### *ALERTS:*

• Va. Code Ann. § 3.2-6540(K)(1), which pertains to local government regulation and disposition of dangerous dogs, provides that "[n]o animal shall be

found by the court to be a dangerous dog . . . [s]olely because it is a particular breed."

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.5, 27.1

Kent Sinclair, VIRGINIA REMEDIES §§ 27-1, 70-2

MICHIE'S JURISPRUDENCE, Animals §§ 1 through 9; 16 through 26

## Instruction No. 29.020
## Dog Owner's Duty: No Leash Ordinance

**If the owner of a dog has no reason to know that his dog might cause injury to others, he may allow his dog to run free.**

**If the owner of a dog knows, or should know, that his dog might cause injury, he has a duty to use ordinary care to prevent injury to others.**

**If an owner fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Stout v. Bartholomew, 261 Va. 547, 554–55, 557–58, 544 S.E.2d 653, 657–59 (2001)*; *Butler v. Frieden, 208 Va. 352, 354, 158 S.E.2d 121, 123 (1967).*

### PRACTICE COMMENTARY

This instruction will often be accompanied by Instruction No. 29.010, Owner Charged With Knowledge of Propensities of the Breed. If the dog is from a so-called "biting" breed, letting it run loose may be negligence even without a leash law. A dog found to be a "dangerous dog" under Va. Code Ann. § 3.2-6540, *et seq.* must be registered thereafter as such and its owner must comply with the statutory precautions and remedies set forth in the statute as ordered by a court.

### *ALERTS:*

- Do not use this instruction where there is a valid leash law or other similar type of ordinance in force.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.5, 27.1

Kent Sinclair, VIRGINIA REMEDIES §§ 27-1, 70-2

MICHIE'S JURISPRUDENCE, Animals §§ 1 through 9; 16 through 26

## Instruction No. 29.030
## Owner's Duty: Wild Animals

**The owner of** [a; an] (name of particular wild animal) **is charged with knowledge of its natural inclinations or characteristics and has a duty to use a high degree of care to keep it confined and restrained so as not to cause injury to others.**

**If an owner fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Panorama Resort v. Nichols, 165 Va. 289, 296–97, 182 S.E. 235, 238–39 (1935).*

### PRACTICE COMMENTARY

See Instruction No. 29.010, Owner Charged With Knowledge of Propensities of the Breed.

The Supreme Court of Virginia has held that the scope of this heightened duty of care, with respect to keeping wild animals, relates to both the (i) manner and (ii) place of the animals' keeping. *Panorama Resort, 165 Va. at 296, 182 S.E. at 238.*

### *ALERTS:*

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.5, 27.1

Kent Sinclair, VIRGINIA REMEDIES §§ 27-1, 70-2

MICHIE'S JURISPRUDENCE, Animals §§ 1 through 9; 16 through 26

## Instruction No. 29.040
## Wild Animals: Contributory Negligence

**A person who knows he is in the vicinity of** [a; an] (name of particular wild animal) **is charged with knowledge of its natural inclinations or characteristics and has a duty to use ordinary care for his own safety.**

**If a person fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Panorama Resort v. Nichols, 165 Va. 289, 296–97, 182 S.E. 235, 238–39 (1935).*

### PRACTICE COMMENTARY

See **Chapter 6, Contributory Negligence and Assumption of the Risk**.

In *Panorama Resort, 165 Va. at 296, 182 S.E. at 238*, the Supreme Court of Virginia held "that the principle of contributory negligence should apply [in wild animal cases] as in actions for personal injuries generally." In that case, the Court opined that the plaintiff had the duty to "us[e] his common sense (that is, by exercising ordinary care) to see that he placed himself in a position of obvious safety." *Id. at 297, 192 S.E. at 239.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.5, 27.1

Kent Sinclair, VIRGINIA REMEDIES §§ 27-1, 70-2

MICHIE'S JURISPRUDENCE, Animals §§ 1 through 9; 16 through 26

# Chapter 30

# DANGEROUS INSTRUMENTALITIES

## Scope Note


| | |
|---|---|
| **Instruction No. 30.000** | **Dangerous Instrumentalities and Related Activities: General Duty of Care** |
| **Instruction No. 30.010** | **Explosives: Strict Liability for Blasting Damage** |
| **Instruction No. 30.030** | **Electricity and Gas: Duty to Inspect and Repair** |
| **Instruction No. 30.040** | **Electricity: Furnishing Current for Another's Line—Duties to Inspect and Withhold Supply** |
| **Instruction No. 30.045** | **Gas: Furnishing to Another's Pipe—Duties to Inspect and Withhold Supply** |
| **Instruction No. 30.050** | **Electricity: Duty to Insulate Wires** |

# SCOPE NOTE

These instructions state the duties for persons using, possessing, producing, supplying, and/or distributing dangerous instrumentalities such as explosives, gas (whether propane, natural gas, or other similar fuel) or electricity. Instruction No. 30.000 states the general duty owed by persons using dangerous instrumentalities to use a high degree of care. The care required will vary according to the dangers involved and will normally be a question for the jury.

A general legal definition of "dangerous instrumentality" is provided in the Practice Commentary to Instruction No. 30.000.

Virginia has adopted strict liability for direct damage caused by blasting, as set out in Instruction No. 30.010. In *Barnes v. Graham Va. Quarries, Inc., 204 Va. 414, 417, 132 S.E.2d 395, 397 (1963)*, the Court allowed recovery for moving expenses due to blasting damage on a nuisance theory. See Chapter 26, Nuisance.

Instruction No. 30.030 covers the duty to inspect pipes, mains, wires, and appliances or other similar equipment involved in the production, transmission, or distribution of gas or electricity, and the duty to repair any leak or defect. Instruction No. 30.040 sets out the duty to inspect when a producer, transmitter, or distributor of electricity supplies current to lines owned or controlled by it, as well as a duty to not supply electricity when it has actual knowledge of a defect in a line or knows of facts and circumstances sufficient to put it on notice that a line is defective. Instruction 30.045 sets out the similar duties owed by a producer, transmitter, or distributor of gas. These instructions amplify Instruction No. 30.030 as such relates to gas and electricity.

Instruction No. 30.050 states the duty owed by a company that produces, transmits, or distributes electricity to insulate its transmission lines.

## Instruction No. 30.000
## Dangerous Instrumentalities and Related Activities: General Duty of Care

**A person; utility** [keeping explosives; possessing explosives; engaged in the production of electricity or natural gas; engaged in the distribution of electricity or natural gas; (name other similar activity involving a similarly dangerous instrumentality)] **has a duty to use a high degree of care, corresponding to the dangers involved, to prevent injury to others.**

**If a person fails to perform this duty, then that person is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 255–56, 520 S.E.2d 164, 176 (1999)*; *Hegwood v. Virginia Natural Gas Inc., 256 Va. 362, 369, 505 S.E.2d 372, 376–77 (1998)*; *Appalachian Power Co. v. La Force, 214 Va. 438, 440, 201 S.E.2d 768, 770 (1974)*; *Robbins v. Old Dominion Power Co., 204 Va. 390, 396–97, 131 S.E.2d 274, 279 (1963)*; *Smith v. Virginia Elec. Power Co., 204 Va. 128, 132–33, 129 S.E.2d 655, 659 (1963)*; *Daugherty v. Hippchen, 175 Va. 62, 65, 7 S.E.2d 119, 120 (1940).*

### PRACTICE COMMENTARY

A "dangerous instrumentality" is "[a]n instrument, substance, or condition so inherently dangerous that it may cause serious bodily injury or death without human use or interference." BLACK'S LAW DICTIONARY 451 (9th ed. 2009).

Persons storing explosives and those producing or distributing electricity or natural gas have all been held to the same standard of care.

The degree of care required of one who keeps or stores explosives is relative, and care must be taken in proportion to the danger involved. *Daugherty, 175 Va. at 65, 7 S.E.2d at 120.*

Explosives are equally deadly as electric current. Both should be guarded and controlled with utmost care and caution. *Daugherty, 175 Va. at 66, 7 S.E.2d at 121.*

With respect to the duty owed a trespasser or a bare licensee for his own convenience entering an electrical transmission right-of-way, see *Appalachian Power Co., 214 Va. at 441, 201 S.E.2d at 770.* With respect to the duty owed to a child trespasser, see *Daugherty, 175 Va. at 65–66, 7 S.E.2d at 120–21,* and *Dungee, 258 Va. at 255–56, 520 S.E.2d at 176.*

☞ ***PRACTICE POINTER:*** If the damage sued for is caused by blasting, see Instruction No. 30.010, Strict Liability for Blasting Damage.

### *ALERTS:*

- It is not clear whether bottled gas, which is distributed in pressure tanks by commercial enterprises, is treated like natural gas.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Automobiles § 13; Electricity §§ 10, 11; Evidence §§ 10, 46; Explosions and Explosives § 3; Fires § 3; Gas Companies § 13; Independent Contractors § 16; Negligence §§ 8, 12, 16, 22, 64; Torts § 2

## Instruction No. 30.010
## Explosives: Strict Liability for Blasting Damage

**A person who uses explosives in blasting is liable for damage that is a direct and proximate result of the blasting.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Laughon & Johnson, Inc. v. Burch, 222 Va. 200, 204, 278 S.E.2d 856, 859 (1981)*; *M.W. Worley Constr. Co. v. Hungerford, Inc., 215 Va. 377, 380, 210 S.E.2d 161, 164 (1974).*

### PRACTICE COMMENTARY

The Court in *Worley* imposed strict liability in cases involving direct damage to neighboring property or direct injury to persons thereon from flying debris. *M.W. Worley Constr. Co., 215 Va. at 380, 210 S.E.2d at 164.* In *Laughon & Johnson*, the Court imposed strict liability in cases involving vibration or concussion damage, holding that "when property is damaged by vibration or concussion from blasting operations, there will be liability upon the blaster irrespective of negligence, provided, of course, the damage claimed is a direct and proximate result of the explosion." *222 Va. at 204, 278 S.E.2d at 859.*

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 8.01-224 provides: "The defense of governmental immunity shall not be available to any person, firm or corporation in any cause of action for damages to the property of others proximately or directly resulting from blasting or the use of explosives in the performance of work for or on behalf of any governmental agency."

### *ALERTS:*

- The rule of strict liability does not apply to persons harmed by an ultrahazardous activity who had reason to know the risk which made the activity ultrahazardous and, by virtue of privity of contract, took part in it. See *Worley, 215 Va. at 380, 210 S.E.2d at 164.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Automobiles § 13; Electricity §§ 10, 11; Evidence §§ 10, 46; Explosions and Explosives § 3; Fires § 3; Gas Companies § 13; Independent Contractors § 16; Negligence §§ 8, 12, 16, 22, 64; Torts § 2

## Instruction No. 30.030
## Electricity and Gas: Duty to Inspect and Repair

**A** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of** [gas; electricity] **has a duty to make reasonable and proper inspections of** [pipes; mains;wires; appliances; (name of other equipment)] **under his control and a duty to repair promptly and effectively any leak or defect of which he knew or should have known, regardless of the cause.**

**If a person fails to perform either or both of these duties, then that person is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 260, 520 S.E.2d 164, 179 (1999)*; *Hegwood v. Virginia Natural Gas, 256 Va. 362, 369, 505 S.E.2d 372, 376–77 (1998)*; *Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 156, 63 S.E.2d 750, 754 (1951).*

### PRACTICE COMMENTARY

This instruction should be used in conjunction with Instruction No. 30.000, which states the general duty of care.

There is "no duty to replace or to excavate and inspect" old gas mains just because they are old. See *City of Richmond v. Atlantic Co., 273 F.2d 902, 913 (4th Cir. 1960); Smith v. City of Richmond, 184 Va. 40, 47, 34 S.E.2d 371, 374 (1945).*

### *ALERTS:*

- Where the utility was supplying gas to a multi-family dwelling, it had a duty to inspect the piping within the dwelling because the facts and circumstances known to the utility's agent before turning the gas on were sufficient to put him on notice that the piping in the dwelling was defective. *Lynchburg Gas Co. v. Sale, 160 Va. 783, 789, 169 S.E. 577, 579 (1933).*

- This instruction does not apply to persons furnishing electricity or gas to lines, pipes, appliances, or similar equipment wholly built, owned or controlled by someone else. See Instructions Nos. 30.040 (electricity); 30.045 (gas).

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Electricity §§ 10, 11; Evidence §§ 10, 46; Explosions and Explosives § 3; Fires § 3; Gas Companies § 13; Independent Contractors § 16; Negligence §§ 8, 12, 16, 22, 64; Torts § 2

## Instruction No. 30.040
## Electricity: Furnishing Current for Another's Line—Duties to Inspect and Withhold Supply

**A** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity has no duty to inspect a line to which it supplies electrical current unless it** [owns; built; controls; has an interest in the management or operation of] **the line. But a** [person; **utility**; (name of other producing, transmitting, or distributing entity)] **does have a duty not to supply current to a line if it** [has actual knowledge of a defect in the line; knows of facts and circumstances sufficient to put it on notice that the line is defective]**.**

**If a** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity fails to perform either of these duties, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Kroger Co. v. Appalachian Power Co., 244 Va. 560, 564, 422 S.E.2d 757, 759 (1992)*; *Virginia Elec. & Power Co. v. Daniel, 202 Va. 731, 735, 119 S.E.2d 246, 249 (1961)*; *Haywood v. South Hill Mfg. Co., 142 Va. 761, 767, 128 S.E. 362, 364 (1925).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- Where a utility was supplying gas to a multi-family dwelling, it had a duty to inspect the piping within the dwelling because the facts and circumstances known to the utility's agent before turning the gas on were sufficient to put him on notice that the piping in the dwelling was defective. *Lynchburg Gas Co. v. Sale, 160 Va. 783, 789, 169 S.E. 577, 579 (1933)*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Electricity §§ 10, 11; Evidence §§ 10, 46; Gas Companies § 13; Independent Contractors § 16; Negligence §§ 8, 12, 16, 22, 64; Torts § 2

## Instruction No. 30.045
## Gas: Furnishing to Another's Pipe—Duties to Inspect and Withhold Supply

**A** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of gas has no duty to inspect a pipe to which it supplies gas unless it** [owns; built; controls; has an interest in the management or operation of] **the pipe. But a** [person; **utility**; (name of other producing, transmitting, or distributing entity)] **does have a duty not to supply gas to a pipe if it** [has actual knowledge of a defect in the pipe; knows of facts and circumstances sufficient to put it on notice that the pipe is defective]**.**

**If a** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of gas fails to perform either of these duties, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lynchburg Gas Co. v. Sale, 160 Va. 783, 789, 169 S.E. 577, 579 (1933)*

### PRACTICE COMMENTARY

Where a utility was supplying gas to a multi-family dwelling, it had a duty to inspect the piping within the dwelling because the facts and circumstances known to the utility's agent before turning the gas on were sufficient to put him on notice that the piping in the dwelling was defective. *Lynchburg Gas Co. v. Sale, 160 Va. 783, 789, 169 S.E. 577, 579 (1933)*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Electricity §§ 10, 11; Evidence §§ 10, 46; Gas Companies § 13; Independent Contractors § 16;Negligence §§ 8, 12, 16, 22, 64; Torts § 2

## Instruction No. 30.050
## Electricity: Duty to Insulate Wires

**A** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity has a duty to keep its transmission lines properly insulated at places where people might reasonably be expected** [to go for work, business or pleasure; to come in contact with the lines]**.**

**If a** [person; utility; (name of other producing, transmitting, or distributing entity)] **engaged in the** [production; transmission; distribution] **of electricity fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Virginia Elec. & Power Co. v. Winesett, 225 Va. 459, 469, 303 S.E.2d 868, 875 (1983)*; *Smith v. Virginia Elec. & Power Co., 204 Va. 128, 132–33, 129 S.E.2d 655, 659 (1963)*; *Northern Virginia Power Co. v. Bailey, 194 Va. 464, 469, 73 S.E.2d 425, 428 (1952)*; *Trimyer v. Norfolk Tallow Co., 192 Va. 776, 783, 66 S.E.2d 441, 445 (1951).*

### PRACTICE COMMENTARY

This instruction deals with the duty of a company that produces, transmits, or distributes electricity to insulate its power lines, but the duty is not absolute. It only exists at places where others may reasonably be expected to go for work, business, or pleasure; that is, where persons may reasonably be expected to come in contact with the power lines. Such insulation is not required if the company maintains its wires at such height that it is not reasonable to anticipate that people will come in contact with them. *Winesett, 225 Va. at 469, 303 S.E.2d at 875; Smith, 204 Va. at 132–33, 129 S.E.2d at 659; Bailey, 194 Va. at 469–70, 73 S.E.2d at 428; Trimyer, 192 Va. at 783–84, 66 S.E.2d at 445.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 2.2, 2.5, 3.11, 16.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 25.02, 26.02, 26.10

Kent Sinclair, VIRGINIA REMEDIES §§ 25-2, 27-1, 27-7

MICHIE'S JURISPRUDENCE, Electricity §§ 10, 11; Evidence §§ 10, 46; Explosions and Explosives § 3; Fires § 3; Gas Companies § 13; Independent Contractors § 16; Negligence §§ 8, 12, 16, 22, 64; Torts § 2

# Chapter 31

# MUNICIPAL CORPORATIONS—GENERAL

## SCOPE NOTE

The municipal corporations materials are divided into two chapters. This chapter deals with the general liability of municipal corporations. The next chapter deals with a municipal corporation's liability for defects in its streets and sidewalks.

### General Liability of Municipal Corporations

*I. DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY FUNCTIONS*

In Virginia, municipal corporations exercise two types of functions, governmental and proprietary. *Harrell v. City of Norfolk, 265 Va. 500, 502, 578 S.E.2d 756, 757 (2003)*; *Niese v. City of Alexandria, 264 Va. 230, 238, 564 S.E.2d 127, 132 (2002)*; *Fenon v. City of Norfolk, 203 Va. 551, 555, 125 S.E.2d 808, 811 (1962)*. A function is governmental in nature if it is directly related to the general health, safety, and welfare of the citizens. *Niese, 264 Va. at 239, 564 S.E.2d at 132*; *Edwards v. City of Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989)*. In contrast, a function is proprietary in nature if it involves a privilege and power performed primarily for the benefit of the municipality. *City of Virginia Beach v. Carmichael Dev. Co., 259 Va. 493, 499, 527 S.E.2d 778, 782 (2000)*; *Hoggard v. City of Richmond, 172 Va. 145, 147–48, 200 S.E. 610, 611 (1939)*. As a general rule, when an allegedly negligent act involves the routine maintenance or operation of a service being provided by a municipality, the function is considered to be a proprietary one. *Carter v. Chesterfield County Health Comm'n, 259 Va. 588, 592, 527 S.E.2d 783, 785 (2000)*; *Carmichael Dev. Co., 259 Va. at 499, 527 S.E.2d at 782*; *Woods v. Town of Marion, 245 Va. 44, 45, 425 S.E.2d 487, 488 (1993)*.

A municipality is immune from liability for negligence in the exercise of a governmental function, as well as for negligence in the failure to exercise a governmental function. *Harrell, 265 Va. at 502, 578 S.E.2d at 757*; *Carmichael Dev. Co., 259 Va. at 499, 527 S.E.2d at 782*; *Woods, 245 Va. at 45, 425 S.E.2d at 488*. However, a municipality is liable, in the same manner as an individual or a private entity, for injuries resulting from negligence in the performance of proprietary functions. *Harrell, 265 Va. at 502, 578 S.E.2d at 757*; *Woods, 245 Va. at 45, 425 S.E.2d at 488*.

The Court has held that when governmental and proprietary functions coincide, "the governmental function is the overriding factor," and sovereign immunity will shield the

locality from liability. *Massenburg v. City of Petersburg, 298 Va. 212, 221, 836 S.E.2d 391, 397 (2019).* See also *Harrell, 265 Va. at 504, 578 S.E.2d at 758*; *Carmichael Dev. Co., 259 Va. at 499, 527 S.E.2d at 782*; *Bialk v. City of Hampton, 242 Va. 56, 58, 405 S.E.2d 619, 620–21 (1991).*

The distinction between a governmental and a proprietary function is difficult to draw with certainty; many functions performed by modern municipalities are of a mixed governmental and proprietary nature. This Scope Note distinguishes those municipal functions that the Supreme Court of Virginia has identified as proprietary from those that it has identified as governmental. Where the Court has not spoken, this note does not attempt to categorize an activity as either proprietary or governmental.

## *II. PROPRIETARY FUNCTIONS*

### Utilities

Municipalities act in a proprietary role when providing public utility services. Hence, they are charged with the same standard of care as a private utility. See the instructions on Dangerous Instrumentalities, Chapter 30, for the applicable tort instructions. Specifically, Virginia courts have determined that providing any of the following services is a proprietary function: water, *City of Richmond v. Hood Rubber Products Co., 168 Va. 11, 17, 190 S.E. 95, 98 (1937)* and *City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 70–74, 138 S.E. 503, 506–07 (1927)*; and electricity, *Light v. City of Danville, 168 Va. 181, 209, 190 S.E. 276, 287 (1937).* But see *City of Chesapeake v. Cunningham, 268 Va. 624, 640, 604 S.E.2d 420, 430 (2004)* (holding that the municipality's actions in redesigning and upgrading its water treatment system were governmental functions, entitling the City to immunity). Compare *Massenburg, 298 Va. at 218–21, 836 S.E.2d at 396–97* (locality's installation and maintenance of fire hydrants that use public water system to respond to fire emergencies are immune government functions) with *Virginia Bonded Warehouse Corp., 148 Va. at 70–74, 138 S.E. at 506–07* (city's management of public water system supplying water to privately installed and owned fire-suppression sprinkler system is a proprietary function that does not trigger sovereign immunity).

A municipality may be held liable for damages proximately caused by the negligent operation or maintenance of water, sewer, or drainage systems under its control. *Massenburg, 298 Va. at 219, 836 S.E.2d at 396* (well settled that the routine operation and maintenance of a municipal water and sewer system is a proprietary function); *Robertson v. Western Virginia Water Auth., 287 Va. 158, 161, 752 S.E.2d 875, 876–77 (2014)* (maintenance and operation of a sanitary sewer system); *City of Richmond v. Cheatwood, 130 Va. 76, 92, 107 S.E. 830, 836 (1921)* (city held liable where existing arches were insufficient to accommodate the increased flow of water following street improvements). See also *Robertson v. City of Alexandria, 210 Va. 418, 423, 171 S.E.2d 692, 695–96 (1970)* (city was not liable because it did not control relevant sections of the drainage area). If a sewer becomes clogged because of negligent maintenance or because the sewer is inadequate to handle the flow which could have been reasonably anticipated, the municipality is liable on a negligence theory or a nuisance theory if the

effluent proximately damages the plaintiff's property. *City of Richmond v. Wood, 109 Va. 75, 81, 63 S.E. 449, 451–52 (1909); Chalkley v. City of Richmond, 88 Va. 402, 406–10, 14 S.E. 339, 341–42 (1891).*

Suits against a locality, "because of, or arising out of, the design, maintenance, performance, operation or existence" of a dam or other structure or device, "the purpose of which is to prevent . . . flooding or inundation" of a locality, may not be brought unless based upon a written contract. Va. Code Ann. § 15.2-970. See *Peerless Ins. Co. v. County of Fairfax, 274 Va. 236, 244–45, 645 S.E.2d. 478, 482–83 (2007)* (storm drainage system and associated dry detention pond easement); *Continental Casualty Co. v. Town of Blacksburg, 846 F. Supp. 483, 485–86 (W.D. Va. 1993)* (storm drainage system).

**Streets and roads**

The routine maintenance of existing streets is a proprietary function and subjects a city to liability for its failure to maintain its streets in good repair and in safe condition for travel, free from dangerous defects or obstructions. *Woods, 245 Va. at 44, 47, 425 S.E.2d at 489.* However, snow removal for the common good in emergency situations is a governmental function. *Stanfield v. Peregoy, 245 Va. 339, 344, 429 S.E.2d 11, 13–14 (1993).* Similarly, cleaning up the streets after a storm is a governmental function. *Fenon v. City of Norfolk, 203 Va. 551, 555–56, 125 S.E.2d 808, 811–12 (1962).* In addition, the planning, designing, laying out, and construction of streets and roads have been held to be a governmental function. *Bialk, 242 Va. at 58, 405 S.E.2d at 620.* This topic is covered in more detail in Chapter 32, Municipal Corporations—Streets, Sidewalks and Bridges.

**Recreational facilities**

A municipality performs a ministerial (proprietary) act in maintaining a swimming and bathing pool. *Hoggard, 172 Va. at 157–58, 200 S.E. at 615–16.* After *Hoggard*, the General Assembly passed Va. Code Ann. § 15.2-1809, which provides that municipalities may be held liable in connection with parks, recreation facilities, or playgrounds only upon a showing of gross negligence of any of its officers or agents in the maintenance or operation of such park, recreational facility or playground. See *Town of Big Stone Gap v. Johnson, 184 Va. 375, 378 n.1, 35 S.E.2d 71, 73 n.1 (1945).* See also *City of Lynchburg v. Brown, 270 Va. 166, 167, 613 S.E.2d 407, 408 (2005); Chapman v. City of Virginia Beach, 252 Va. 186, 189–91, 475 S.E.2d 798, 800–01 (1996).* Instruction No. 4.030 defines gross negligence.

Va. Code Ann. § 15.2-1809 does not abrogate the sovereign immunity of counties. See *Seabolt v. County of Albemarle, 283 Va. 717, 720–21, 724 S.E.2d 715, 717 (2012)* (under Va. Code Ann. § 15.2-1809, a county cannot be held liable for acts of gross negligence). But a bus used by a county recreation department to transport senior citizens on a recreational trip is not a "recreational facility" entitled to the immunity from liability for ordinary negligence granted by Va. Code Ann. § 15.2-1809. *DePriest v. Pearson, 239 Va. 134, 136–37, 387 S.E.2d 480, 481 (1990)* (decided under predecessor to Va. Code Ann. § 15.2-1809). A refuse truck driver employed by a municipal coliseum is entitled to immunity because waste removal is a necessary and

essential aspect of the operation of the recreational facility. *Decker v. Harlan, 260 Va. 66, 70, 531 S.E.2d 309, 311 (2000).* In *Lostrangio v. Laingford, 261 Va. 495, 499–500, 544 S.E.2d 357, 359–60 (2001),* the Supreme Court of Virginia distinguished between a "recreational event" sponsored by a town (4th of July celebration) and a "recreational facility" envisioned by Va. Code Ann. § 15.2-1809, holding that the statute does not afford immunity to cities and towns sponsoring "recreational events."

A municipality may be entitled to the immunity afforded by Va. Code Ann. § 29.1-509 in providing and maintaining public access over private land for recreational purposes. *City of Virginia Beach v. Flippen, 251 Va. 358, 362, 467 S.E.2d 471, 474 (1996).*

While a municipality has no immunity from liability for injury caused by a nuisance, by enacting Va. Code Ann. § 15.2-1809, the General Assembly has created a clear exception to the no immunity rule in nuisance actions against municipalities so far as recreational facilities are concerned, and thus has abrogated the common law. *Hawthorn v. City of Richmond, 253 Va. 283, 287, 484 S.E.2d 603, 605 (1997).*

**Nuisances**

If a municipality creates and/or maintains a dangerous condition, it constitutes a public nuisance, and the municipality is not immune from liability for creating and/or maintaining the nuisance. *Taylor v. City of Charlottesville, 240 Va. 367, 373–74, 397 S.E.2d 832, 836–37 (1990).* However, a municipality is not liable for failing to abate a nuisance it did not create. *Miller & Meyers v. City of Newport News, 101 Va. 432, 435–42, 44 S.E. 712, 713–15 (1903).* See Chapter 26, Nuisance. The municipality must have had notice, actual or constructive, of the nuisance and a reasonable period to cure the defect and abate the nuisance. *City of Richmond v. Holt, 264 Va. 101, 105–06, 563 S.E.2d 690, 693 (2002); City of Virginia Beach v. Roman, 201 Va. 879, 883–84, 114 S.E.2d 749, 752–53 (1960); Burson v. Bristol, 176 Va. 53, 65, 10 S.E.2d 541, 545 (1940).* In an action against a municipality for negligence, the plaintiff must prove notice, either actual or constructive. See Instruction No. 32.040, Municipality's Duty: Repair or Warn Upon Notice of Defect.

**Other kinds of activities and properties**

Municipalities may be held liable for torts arising from the following proprietary functions: operating a market, *City of Norfolk v. Anthony, 117 Va. 777, 782–83, 86 S.E. 68, 69–70 (1915);* operating a ferry for profit, *City of Portsmouth v. Madrey, 168 Va. 517, 523–24, 191 S.E. 595, 598 (1937);* operating a wharf for profit, *City of Petersburg v. Applegarth, 69 Va. (28 Gratt.) 321, 343–44, 347 (1877);* operating a housing project, *Virginia Elec. & Power Co. v. Hampton Redev. & Hous. Auth., 217 Va. 30, 33–36, 225 S.E.2d 364, 367–69 (1976).*

When a municipality leases property to private individuals or institutions, it is charged with the same standard of care as an ordinary landlord. *City of Richmond v. Grizzard, 205 Va. 298, 302–05, 136 S.E.2d 827, 830–32 (1964).* Note that the municipality-landlord may escape liability if it can show that the leased property is in the exclusive possession and control of the lessee. 18A E. McQuillin, MUNICIPAL CORPORATIONS § 53:118 (rev. 3d ed.). The instructions on Landlord and Tenant, Chapter 24, can be modified for these situations.

**Note on limited waiver of sovereign immunity for school boards**

Va. Code Ann. § 22.1-194 abrogates a school board's sovereign immunity to a limited degree. If the school board is insured under a liability policy that covers a vehicle involved in an accident, the school board is subject to action up to, but not in excess of, the limits of valid and collectible insurance in force to cover the injury complained of, and the defense of governmental immunity shall not bar an action or recovery. *Wagoner v. Benson, 256 Va. 260, 262–63, 505 S.E.2d 188, 189 (1998).* Cf. *Linhart v. Lawson, 261 Va. 30, 33–37, 540 S.E.2d 875, 876–78 (2001)* (statute that abrogates immunity of *school board* for acts of simple negligence of its bus driver does not abrogate immunity of *bus driver* for acts of simple negligence).

*III. GOVERNMENTAL FUNCTIONS*

When a municipal corporation performs governmental functions, it is considered an agent of the Commonwealth and is granted immunity from liability for its torts, including intentional torts committed by an employee during the performance of a governmental function, under the doctrine of sovereign immunity. *Niese, 264 Va. at 239–40, 564 S.E.2d at 132–33.* Generally, governmental functions may be categorized as those pertaining to the "health, safety, and welfare of the citizens." *Id., 264 Va. at 239, 564 S.E.2d at 132.* "Stated another way, a governmental function involves the exercise of an entity's political, discretionary, or legislative authority." *Id.*

The Supreme Court of Virginia has decided that the following functions are governmental: police protection; *Niese, 264 Va. at 239–40, 564 S.E.2d at 132–33;* garbage removal, *Ashbury v. City of Norfolk, 152 Va. 278, 292, 147 S.E. 223, 227 (1929)*; licensing, *Terry v. City of Richmond, 94 Va. 537, 543–46, 27 S.E. 429, 430–32 (1897)*; education, *Kellam v. School Bd. of the City of Norfolk, 202 Va. 252, 254–59, 117 S.E.2d 96, 97–100 (1960)*; providing a jailhouse, *Franklin v. Town of Richlands, 161 Va. 156. 158, 170 S.E. 718, 719 (1933)*; provision and maintenance of fire hydrants, *Massenburg, 298 Va. at 221, 836 S.E.2d at 397*; organization and operation of a fire department, *Virginia Bonded Warehouse Corp., 148 Va. at 70–71, 138 S.E. at 506*; street design, *Freeman v. City of Norfolk, 221 Va. 57, 59, 266 S.E.2d 885, 886 (1980)*; emergency snow removal, *Bialk, 242 Va. at 58–59, 405 S.E.2d at 621*; snow and ice removal from a leased parking space, *Gambrell v. City of Norfolk, 267 Va. 353, 358–59, 593 S.E.2d 246, 249–50 (2004);* traffic regulatory devices such as traffic signals and cross-walks, *Harrell, 265 Va. at 504, 578 S.E.2d at 757–58*; nursing care facility/ nursing services, *Carter v. Chesterfield County Health Comm'n, 259 Va. at 594, 527 S.E.2d at 787*; independent-living facility, *Jean Moreau & Assocs. v. Health Center Comm'n for the County of Chesterfield, 283 Va. 128, 146, 720 S.E.2d 105, 115 (2012)*; and a municipality's act of acquiring by contract and reselling or leasing property to benefit the welfare and safety of the public, *Carmichael Dev. Co., 259 Va. at 501–02, 527 S.E.2d at 783.*

The Supreme Court has declined to create an exception to the protection of sovereign immunity for the independent tort of negligent retention of an employee who performs a governmental function. *Niese, 264 Va. at 240–41, 564 S.E.2d at 133.*

### *IV. QUANTUM MERUIT*

Municipal corporations are immune from quantum meruit claims when performing governmental functions, but a plaintiff's claim on this theory is not barred by sovereign immunity for proprietary functions. *Jean Moreau & Assocs., 283 Va. at 138–40, 720 S.E.2d at 110–12.*

### *V. GOVERNMENTAL EMPLOYEES AND THE MESSINA v. BURDEN* FOUR-PART TEST

A governmental employee enjoys the same immunity as the governmental agency for which the employee works if the employee meets the test set out in *Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984).* The court will consider the following factors: (1) the nature of the function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; (4) whether the act complained of involved the use of judgment and discretion. *Messina, 228 Va. at 313, 321 S.E.2d at 663.* Sovereign immunity protects a government agent or employee from tort claims involving only simple negligence. "A state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually." *James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).* See also *Cromartie v. Billings, 298 Va. 284, 297, 837 S.E.2d 247, 254 (2020)*; *Colby v. Boyden, 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991)*; *Sayers v. Bullar, 180 Va. 222, 228–29, 22 S.E.2d 9, 12 (1942).*

A governmental employee performing a ministerial duty that does not involve the use of judgment and discretion does not enjoy immunity. *Friday-Spivey v. Collier, 268 Va. 384, 387, 390–91, 601 S.E.2d 591, 592 594–95 (2004)* (fireman driving in a "nonemergency manner without 'lights and sirens' " was required to obey traffic regulations and was not, under these circumstances, exercising discretion for purposes of sovereign immunity); *First Virginia Bank-Colonial v. Baker, 225 Va. 72, 78, 301 S.E.2d 8, 11 (1983)* (circuit court clerk did not enjoy immunity for the negligence of her deputy who made an indexing error that constituted malfeasance of a ministerial duty). But see *McBride v. Bennett, 288 Va. 450, 457–58, 764 S.E.2d 44, 48 (2014)* (police officers driving at high speeds without lights or sirens in response to a domestic disturbance call were entitled to sovereign immunity because the officers themselves determined it was necessary to respond "in an emergency manner").

For the responsibility of employees of the state or of a governmental agency created by the state, see *Cromartie, 298 Va. at 297–98, 837 S.E.2d at 254* (police officer conducting arrest and warrantless search); *Pike v. Hagaman, 292 Va. 209, 217, 787 S.E.2d 89, 93 (2016)* (registered nurse); *Couplin v. Payne, 270 Va. 129, 136, 613 S.E.2d 592, 595 (2005)* (Metropolitan Washington Airport Authority); *Lentz v. Morris, 236 Va. 78, 81–83, 372 S.E.2d 608, 609–11 (1988)* (high school teacher); *Messina, 228 Va. at 308–14, 321 S.E.2d at 660–664* (county employee); *First Virginia Bank-Colonial, 225 Va. at 78–81, 301 S.E.2d at 11–13* (deputy clerk of court); *Bowers v. Commonwealth, 225 Va. 245, 250–54,302 S.E.2d 511, 514–16 (1983)* (VDOT engineer); *James, 221 Va. at 51–55, 282 S.E.2d at 868–70*; (physician employed by the state). School boards

enjoy immunity, *Kellam, 202 Va. at 254, 117 S.E.2d at 97–98*, as do public school principals and superintendents. *Banks v. Sellers, 224 Va. 168, 173, 294 S.E.2d 862, 865 (1982)*. But see *Burns v. Gagnon, 283 Va. 657, 673–78, 727 S.E.2d 634, 644–47 (2012)* (school principal not immune from acts of gross negligence). *Va. Code Ann. § 8.01-220.1:2* grants public school teachers immunity from acts and omissions that are not the result of gross negligence or willful conduct.

It is a factual question whether a police officer was acting as an employee of a private employer or as a public officer enforcing a public duty at the time he committed acts for which the complaint was made. *City of Alexandria v. J-W Enterprises, Inc., 279 Va. 711, 717, 691 S.E.2d 769, 772 (2010)*. The court will consider whether the officer was engaged in the performance of a public duty, such as the enforcement of the general laws, or whether the officer was engaged in the protection of a private employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the employer. *J-W Enterprises, Inc., 279 Va. at 718, 691 S.E.2d at 772*.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 11.2, 11.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.08

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.30, 2.31

MICHIE'S JURISPRUDENCE, Counties § 84; Municipal Corporations §§ 2, 92, 102 through 110; Parks, Public Squares, and Playgrounds §§ 6, 7; Public Officers § 49; Streets and Highways §§ 63, 64, 114, 116, 118, 120 through 137

# Chapter 32

# MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES



## Scope Note

**Instruction No. 32.000** **Municipality's Duty: Keep Streets, Sidewalks and Bridges in Safe Condition**

**Instruction No. 32.010** **Municipality's Duty: Warn of Obstruction**

**Instruction No. 32.020** **Pedestrian or Driver Has Right to Assume Reasonably Safe Condition**

**Instruction No. 32.030** **Municipality is Not an Insurer**

**Instruction No. 32.040** **Municipality's Duty: Repair or Warn Upon Notice of Defect**

**Instruction No. 32.050** **Finding Instruction**

# SCOPE NOTE

The municipal corporations materials are divided into two chapters. This chapter deals with a municipal corporation's liability for defects in streets, sidewalks and bridges. Chapter 31 contains a general discussion of the liabilities of municipal corporations.

In general, a municipal corporation may be held liable for failure to keep its streets, sidewalks and bridges in a reasonably safe condition. Instruction No. 32.000 states this principle. A municipal corporation's duty to use ordinary care to keep its streets, sidewalks and bridges in a reasonably safe condition arises from the State's grant to all municipalities of the power pursuant to Va. Code Ann. § 15.2-2001, to "improve, maintain, [and] repair" streets and sidewalks, which grant of power imposes on municipalities the "positive duty" to keep them in reasonably safe condition. *Hicks v. Chesapeake & Ohio R.R. Co., 102 Va. 197, 199, 45 S.E. 888, 889 (1903).* The "positive duty" cannot be delegated to an independent contractor. *Pioneer Const. Co. v. Hambrick, 193 Va. 685, 692, 70 S.E.2d 302, 307 (1952).*

A municipality's duty to warn the public adequately of a temporary obstruction in a street, sidewalk or bridge is set forth in Instruction No. 32.010.

A pedestrian or a driver has the right to assume that a sidewalk, street or bridge is in a reasonably safe condition unless he or she knows that it is not. See Instruction No. 32.020, Pedestrian or Driver has Right to Assume Reasonably Safe Condition.

A municipality is not an insurer against accidents on its streets. Instruction No. 32.030 is based on an instruction that the trial court refused in *City of Portsmouth v. Cilumbrello, 204 Va. 11, 16–17, 129 S.E.2d 31, 34–35 (1963).* On appeal, the Court held that the refusal of the instruction was reversible error on the grounds that such an instruction was necessary to dispel the misconception that a city is liable in all cases where persons suffer injuries because of defects in its streets. *Id.*

When a defect or obstruction in or on a street or highway is caused by a third party, the municipality will be liable only if it is proved that it had actual or constructive notice of the defect and failed to repair the defect or adequately warn of the defect within a reasonable time after receipt of such notice. See Instruction No. 32.040, Municipality's Duty: Repair or Warn Upon Notice of Defect.

Instruction 32.050 is a finding instruction that is applicable to the issues of municipal liability contained in this chapter.

In an action against a municipality, the plaintiff is required by statute to give notice, including the time and place of the accident, to the municipality of a claim for damages to a person or property. Va. Code Ann. § 15.2-209(A). The provisions of Va. Code Ann. § 15.2-209 are mandatory, but not jurisdictional. Va. Code Ann. § 15.2-209(G); *Breeding v. Hensley, 258 Va. 207, 214, 519 S.E.2d 369, 373 (1999)*; *Town of Crewe v. Marler, 228 Va. 109, 112, 319 S.E.2d 748, 749 (1984)*; *City of South Norfolk v. Dail, 187 Va. 495, 503, 47 S.E.2d 405, 408–09 (1948).*

A plaintiff cannot avail himself or herself of the *res ipsa loquitur* doctrine against a municipality, and he or she is subject to the ordinary defenses including assumption of the risk and contributory negligence. *City of Norfolk v. Travis, 149 Va. 523, 531, 534, 140 S.E. 641, 643–44 (1927).* The doctrine of *respondeat superior* may be invoked to

hold a municipality vicariously liable for the negligent acts of its agents committed in the course of performing ministerial or proprietary functions. *Jones v. City of Richmond, 118 Va. 612, 617, 620, 88 S.E. 82, 82–83 (1916).* A municipal corporation is not liable for the failure to exercise, or for the negligent or improper exercise of its governmental, legislative or discretionary powers, nor is it liable for the *ultra vires* acts of its servants. *City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 70, 138 S.E. 503, 506 (1927).*

**Instruction No. 32.000**

**Municipality's Duty: Keep Streets, Sidewalks and Bridges in Safe Condition**

**A city has a duty to use ordinary care to keep its** [streets; sidewalks; bridges] **in a reasonably safe condition for use by the public.**

**If a city fails to perform this duty, then it is negligent.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 15.2-2001.

**Case Authority:** *City of Richmond v. Holt, 264 Va. 101, 105, 563 S.E.2d 690, 693 (2002)*; *Woods v. Town of Marion, 245 Va. 44, 45, 425 S.E.2d 487, 488 (1993)*; *Nolan v. City of Richmond, 194 Va. 943, 947, 76 S.E.2d 126, 128 (1953)*; *Buck v. City of Danville, 177 Va. 582, 585–86, 15 S.E.2d 31, 32–33 (1941)*; *City of Radford v. Calhoun, 165 Va. 24, 29–30, 181 S.E. 345, 347 (1935)*; *Roanoke Ry. & Elec. Co. v. Brown, 155 Va. 259, 276–85, 154 S.E. 526, 532–35 (1930)* (streets include bridges).

### Practice Commentary

The city may not delegate this duty to a third party to escape liability. *City of Richmond v. Branch, 205 Va. 424, 428, 137 S.E.2d 882, 885 (1964)*; see *Votsis v. Ward's Coffee Shop, Inc., 217 Va. 652, 654, 231 S.E.2d 236, 237–38 (1977)* (finding that a business that benefits because a portion of the public sidewalk is used as a driveway into a private parking lot is not liable for defects in the sidewalk used as a driveway).

A city's duty to keep its streets, sidewalks and bridges in a reasonably safe condition extends throughout their entire length and width. *City of Norfolk v. Travis, 149 Va. 523, 528–29, 140 S.E. 641, 642 (1927)*; *City of Richmond v. Pemberton, 108 Va. 220, 225–27, 61 S.E. 787, 788–89 (1908)*. The entire width of a street includes the sidewalk and the grass plot between the street and sidewalk. *Dockery v. City of Norton, 204 Va. 752, 754, 133 S.E.2d 296, 298 (1963)*.

A city has discretion in determining the width or length of a street or sidewalk; it assumes no duty or liability for any portion of the way that is left in a natural state. *Travis, 149 Va. at 528, 140 S.E. at 642*.

The city owes this duty of reasonable care to children properly on the streets as well as to travelers. *Id.*

"Slightly uneven sidewalks are so common—and thus foreseeable to the ordinary person—that they cannot justify the imposition of tort liability." *AlBritton v. Commonwealth, 299 Va. 392, 409–10, 853 S.E.2d 512, 522 (2021)*.

### *ALERTS:*

- This rule does not apply to the governmental function of maintaining traffic signals, *Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979)*; nor does it apply to street design including railings, signs and markings designed to control traffic, *Freeman v. City of Norfolk, 221 Va. 57, 59–60, 266 S.E.2d 885, 886 (1980)*. This instruction also does not apply to the maintenance of crosswalks, which is also a governmental function. *Harrell v. City of Norfolk, 265 Va. 500, 503–04, 578 S.E.2d 756, 757–58 (2003)*. In addition, the rule does not apply when a city is cleaning up its streets following a hurricane; such cleanup is a governmental function for which the City is immune from suit. *Fenon v. City of Norfolk, 203 Va. 551, 555, 125 S.E.2d 808, 811 (1962)*. Neither does it

apply to the failure to place emergency warning signs in a city owned parking lot during an extended snow emergency, which is an act or omission involving the exercise of a governmental function. *Gambrell v. City of Norfolk, 267 Va. 353, 359, 593 S.E.2d 246, 250 (2004).*

• If street design constitutes a public nuisance, however, the municipal corporation is not immune. See *Taylor v. City of Charlottesville, 240 Va. 367, 373–74, 397 S.E.2d 832, 836–37 (1990).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.02

Kent Sinclair, VIRGINIA REMEDIES §§ 27-2, 27-6, 27-7, 65-2

MICHIE'S JURISPRUDENCE, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64, 114 through 162

## Instruction No. 32.010
## Municipality's Duty: Warn of Obstruction

**Normally, the public is entitled to the unobstructed use of a** [street; sidewalk; bridge]**. A city may temporarily obstruct a** [street; sidewalk; bridge]**, but it has a duty to give the public an adequate warning of the obstruction.**

**If a city fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 15.2-2001.

**CASE AUTHORITY:** *City of Richmond, v. Branch, 205 Va. 424, 425, 428–29, 137 S.E.2d 882, 883, 885 (1964); Wray v. Norfolk & W. Ry., 191 Va. 212, 222, 61 S.E.2d 65, 70 (1950); Roanoke v. Sartini, 123 Va. 415, 418–19, 96 S.E. 763, 764 (1918).*

### PRACTICE COMMENTARY

A city must have a legitimate purpose before it can obstruct a street, sidewalk or bridge. *Wray, 191 Va. at 222, 61 S.E.2d at 70.* See Va. Code Ann. § 15.2-2001 for authority of a locality to temporarily obstruct a sidewalk, street, or a bridge.

### *ALERTS:*

- A pedestrian or a driver has a right to assume that a sidewalk, street or bridge is in a reasonably safe condition unless he knows that it's not. See Instruction No. 32.020, Pedestrian or Driver has Right to Assume Reasonably Safe Condition; Instruction No. 6.060, Contributory Negligence: Right to Assume Ordinary Care; and Chapter 14, Motor Vehicles—Pedestrians.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.02

Kent Sinclair, VIRGINIA REMEDIES §§ 27-2, 27-6, 27-7, 65-2

MICHIE'S JURISPRUDENCE, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64, 114 through 162

## Instruction No. 32.020
## Pedestrian or Driver Has Right to Assume Reasonably Safe Condition

**A** [pedestrian; driver] **has a right to assume that a** [sidewalk; street; bridge] **is in a reasonably safe condition unless he or she knows that it is not. He or she does not have to be on the lookout for dangerous conditions or obstructions.**

**However, a** [pedestrian; driver] **has a duty to use ordinary care for his or her own safety if he or she either knows of the dangerous condition or obstruction or if it is so open and obvious that he or she should see it.**

**If a** [pedestrian; driver] **has a duty to use ordinary care for his or her own safety and if he or she fails to perform this duty, then he or she is negligent.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Harrell v. City of Norfolk, 265 Va. 500, 503, 578 S.E.2d 756, 757 (2003); Town of Hillsville v. Nester, 215 Va. 4, 5, 205 S.E.2d 398, 399 (1974); Town of Virginia Beach v. Starr, 194 Va. 34, 36–37, 72 S.E.2d 239, 240 (1952); Pioneer Const. Co. v. Hambrick, 193 Va. 685, 691–92, 70 S.E.2d 302, 306–07 (1952).*

### Practice Commentary

See Chapter 14, Motor Vehicles—Pedestrians, for other duties of pedestrians. When a defect is open and obvious to a person using the sidewalk, he or she cannot recover damages if he or she fails to observe the defect unless there is some excuse for his or her failure. *Starr, 194 Va. at 36, 72 S.E.2d at 240.* When the obstruction is open and obvious, the traveler must exercise greater care and observation. *City of Richmond v. Leaker, 99 Va. 1, 8, 37 S.E. 348, 349–50 (1900).* Even so, he or she is not bound to keep his or her eyes constantly on the pavement. *Tyler v. City of Richmond, 168 Va. 308, 313, 191 S.E. 625, 627 (1937).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 35.02

Kent Sinclair, Virginia Remedies §§ 27-2, 27-6, 27-7, 65-2

Michie's Jurisprudence, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64, 114 through 162

## Instruction No. 32.030
## Municipality is Not an Insurer

**A city is not liable for every accident that happens on its** [streets; sidewalks; bridges]**. Neither is it liable for every injury that is caused by a defect in its** [streets; sidewalks; bridges]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Votsis v. Ward's Coffee Shop, Inc., 217 Va. 652, 654, 231 S.E.2d 236, 237 (1977)*; *City of Newport News v. Anderson, 216 Va. 791, 792–93, 223 S.E.2d 869, 870 (1976)*; *City of Portsmouth v. Cilumbrello, 204 Va. 11, 16–17, 129 S.E.2d 31, 34–35 (1963).*

### PRACTICE COMMENTARY

This instruction is based on an instruction, the refusal of which was held to be reversible error in *Cilumbrello, 204 Va. at 16–17, 129 S.E.2d at 34–35.* It is designed to combat the misconception that a city is liable for all injuries suffered on its streets because of defects in those streets. This instruction substitutes "not liable for" in place of "not an insurer against" to convey the same meaning without using the word "insurer."

☞ ***PRACTICE POINTER:*** This instruction should always be used with Instruction No. 32.000, Municipality's Duty: Keep Streets, Sidewalks and Bridges in Safe Condition. See, e.g., *City of Norfolk v. Hall, 175 Va. 545, 552, 9 S.E.2d 356, 359–360 (1940).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.02

Kent Sinclair, VIRGINIA REMEDIES §§ 27-2, 27-6, 27-7, 65-2

MICHIE'S JURISPRUDENCE, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64, 114 through 162

## Instruction No. 32.040
## Municipality's Duty: Repair or Warn Upon Notice of Defect

**A city has a duty to use ordinary care to** [repair; warn of] **a defect** [in; on] **a** [street; sidewalk; bridge] **within a reasonable time after it has notice of the defect. The notice may be either actual or constructive.**

**A city has actual notice if any city employee who supervises the** [streets; sidewalks; bridges] **or who has power to direct work on them actually knew of the defect** [in; on] **a** [street; sidewalk; bridge]**.**

**A city has constructive notice if the defect** [in; on] **a** [street; sidewalk; bridge] **existed long enough that a city would have discovered it if it had used ordinary care.**

**If a city has notice of a defect** [in; on] **a** [street; sidewalk; bridge]**, either actual or constructive, and fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *City of Richmond v. Holt, 264 Va. 101, 105–07, 563 S.E.2d 690, 693–94 (2002)*; *City of Virginia Beach v. Roman, 201 Va. 879, 883–84, 114 S.E.2d 749, 752–53 (1960).*

### PRACTICE COMMENTARY

This instruction is applicable to those cases in which notice is required to be found as an element of liability. Notice is not necessary, however, in three circumstances: where the defect is caused by the municipality, where the defect is caused by a licensee under a permit granted by the municipality, or where a statute or charter otherwise provides. *West v. City of Portsmouth, 196 Va. 510, 513–14, 84 S.E.2d 503, 505–06 (1954).* For example, where an obstruction is placed in the sidewalk by servants or agents of the municipality, the municipality is liable whether it had notice or not. *Tyler v. Richmond, 168 Va. 308, 312, 191 S.E. 625, 626 (1937).* This instruction may be modified to replace the notice provisions with the above principle in such cases.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.02

Kent Sinclair, VIRGINIA REMEDIES §§ 27-2, 27-6, 27-7, 65-2

MICHIE'S JURISPRUDENCE, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64, 114 through 162

**Instruction No. 32.050**
**Finding Instruction**

**You shall return your verdict for the plaintiff if he or she proved by the greater weight of the evidence:**

**(1) that the city** [created; had actual or constructive notice of] **a defect** [in; on] **a** [street; sidewalk; bridge]**; and**

**(2) that the city negligently failed to** [repair; warn of] **the defect; and**

**(3) that the city's negligence was a proximate cause of the plaintiff's accident and damage.**

**You shall return your verdict for the city:**

**(1) if the plaintiff failed to prove any or all of the three elements above; or**

**(2) if the city proved by the greater weight of the evidence that the plaintiff was negligent and that his or her negligence was a proximate cause of the accident.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *City of Richmond v. Holt, 264 Va. 101, 105–06, 563 S.E.2d 690, 693–94 (2002); West v. City of Portsmouth, 196 Va. 510, 513–14, 84 S.E.2d 503, 505–06 (1954).*

### PRACTICE COMMENTARY

The bracketed choices in element (1) are provided to account for cases in which no notice is required (e.g., when the defect is created by an agent or servant of the municipality), as well as all other cases where either actual or constructive notice is required.

The decision to refer to "a proximate cause" instead of "*the* proximate cause" was deliberate. A defendant's negligent act which is a proximate cause creates liability, but the plaintiff is barred from recovery if he or she was negligent and his or her negligence was a proximate cause of the accident. See, e.g., *Town of Hillsville v. Nester, 215 Va. 4, 5, 205 S.E.2d 398, 399 (1974)*; *Town of Virginia Beach v. Starr, 194 Va. 34, 38, 72 S.E.2d 239, 241 (1952).*

### *ALERTS:*

- This instruction must be tailored to fit your case. For example, if the defense of assumption of the risk is applicable, the instruction must be redrafted to include that defense.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 5.1, 5.3, 11.2, 16.6, 16.8, 16.10

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.02

Kent Sinclair, VIRGINIA REMEDIES §§ 27-2, 27-6, 27-7, 65-2

MICHIE'S JURISPRUDENCE, Bicycles § 2; Bridges § 7; Municipal Corporations §§ 105, 109, 110; Streets and Highways §§ 64; 114 through 162

# Chapter 33

# EMOTIONAL DISTRESS

## Scope Note


**Instruction No. 33.000** **Negligent Infliction of Emotional Distress: Issues**

**Instruction No. 33.100** **Negligent Infliction of Emotional Distress: Finding Instruction**

**Instruction No. 33.200** **Intentional Infliction of Emotional Distress: Issues**

**Instruction No. 33.300** **Intentional Infliction of Emotional Distress: Finding Instruction**

# SCOPE NOTE

Instruction No. 33.000 sets forth the elements that the plaintiff must prove for a claim of negligent infliction of emotional distress where there has been no physical impact. This tort was recognized in *Hughes v. Moore, 214 Va. 27, 34–35, 197 S.E.2d 214, 219–20 (1973)*. In *Hughes,* the Supreme Court of Virginia adhered to the view that where conduct is merely negligent—not willful, wanton, or vindictive—and physical impact is lacking, the plaintiff may not recover for emotional distress alone. *214 Va. at 31, 197 S.E.2d at 217.* However, the Supreme Court said that the plaintiff may recover "if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury." The plaintiff must prove the causal chain by clear and convincing evidence. The plaintiff must prove a symptom or manifestation of a physical injury resulting from the emotional distress. *214 Va. at 34, 197 S.E.2d at 219.* Proof of mere underlying emotional distress is not sufficient. *Myseros v. Sissler, 239 Va. 8, 12–13, 387 S.E.2d 463, 466 (1990).* The Supreme Court in *Hughes* also cautioned that it was not creating an action where the plaintiff may recover damages for emotional distress by merely witnessing an accident. *214 Va. at 34–35, 197 S.E.2d at 219–20.*

Instruction No. 33.200 sets forth the four elements that the plaintiff must prove in order to recover for intentional infliction of emotional distress. The Supreme Court of Virginia has stated that this tort is "not favored in the law." *SuperValu, Inc. v. Johnson, 276 Va. 356, 369–70, 666 S.E.2d 335, 343 (2008).* In addition, in *Russo v. White*, the Supreme Court held that the trial court correctly sustained a demurrer to plaintiff's claim of intentional infliction of emotional distress where the plaintiff failed to adequately allege emotional distress that was so severe that no reasonable person could be expected to endure it. *241 Va. 23, 28, 400 S.E.2d 160, 163 (1991)*; see *Doe v. Baker, 299 Va. 628, 654–55, 857 S.E.2d 573, 589 (2021)* (employer's failure to take corrective measures stronger than mandatory marital counseling in the face of broad and nonspecific allegations of a pastor's 40-year history of inappropriate and disturbing sexual conduct toward women did not rise to the level of being outrageous and intolerable); *Harris v. Kreutzer, 271 Va. 188, 203–05, 624 S.E.2d 24, 33–34 (2006)* (holding the plaintiff failed to plead facts sufficient to support the outrageousness of the alleged tortfeasor's conduct and the severity of her distress).

Finding instructions for both negligent and intentional infliction of emotional distress are provided, respectively, in Instructions No. 33.100 and 33.300.

## Instruction No. 33.000
## Negligent Infliction of Emotional Distress: Issues

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

**(1) Was the defendant negligent;**

**(2) Was the defendant's negligence a proximate cause of any** [emotional distress; fright; shock] **that naturally resulted in a physical injury to the plaintiff; and**

**(3) Did the plaintiff suffer damages as a result of the defendant's act?**

**On issue (1), the plaintiff has the burden of proof by the greater weight of the evidence. On issues (2) and (3), the plaintiff has the burden of proof by clear and convincing evidence.**

**Your decisions on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Baker, 299 Va. 628, 653–54, 857 S.E.2d 573, 588–89 (2021)*; *Anthony v. Verizon Virginia, Inc., 288 Va. 20, 38, 758 S.E.2d 527, 536–37 (2014)*; *Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 137–38, 523 S.E.2d 826, 833–34 (2000)*; *Gray v. INOVA Health Care Servs., 257 Va. 597, 599–600, 514 S.E.2d 355, 356–57 (1999)*; *Bowers v. Westvaco Corp., 244 Va. 139, 147–48, 419 S.E.2d 661, 666–67 (1992)*; *Fairfax Hosp. System, Inc. v. McCarty, 244 Va. 28, 37, 419 S.E.2d 621, 626–27 (1992)*; *Bulala v. Boyd, 239 Va. 218, 226 n.1, 389 S.E.2d 670, 674 n.1 (1990)*; *Hughes v. Moore, 214 Va. 27, 34–35, 197 S.E.2d 214, 219–20 (1973)*.

### PRACTICE COMMENTARY

In *Naccash v. Burger, 223 Va. 406, 416–17, 290 S.E.2d 825, 831 (1982)*, the Supreme Court of Virginia carved out an exception to the general rule that some physical injury must also exist in order to recover for emotional distress and mental anguish. See also *Hughes, 214 Va. at 34, 197 S.E.2d at 219* (stating the general rule that where the claim is for emotional distress and physical injury resulting therefrom, recovery is allowed irrespective of a lack of physical impact so long as an "unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury" is shown by "clear and convincing evidence"). The *Naccash* court allowed recovery for emotional harm without accompanying physical injury to the parents in a wrongful birth suit where there was no claim that the harm was feigned or fraudulent, where the harm was the direct rather than indirect result of the defendant's negligent conduct, and the chain of causal connection was unbroken. The court distinguished but did not overrule the general rule of *Hughes. 223 Va. at 416, 290 S.E.2d at 830–31*. However, in *Myseros v. Sissler, 239 Va. 8, 9 n.2, 387 S.E.2d 463, 464 n.2 (1990)*, the Supreme Court limited *Naccash* to its particular facts. In *Gray*, the Supreme Court distinguished *Naccash*, and held that the defendant owed no duty to a mother who was present and witnessed a negligent injection of her daughter. *257 Va. at 599–600, 514 S.E.2d at 356*. In *Bowers*, the Court allowed the litigant and family members to recover for emotional distress as an element of damages in a nuisance suit. *244 Va. at 147–48, 419 S.E.2d at 666–67*.

### *ALERTS:*

- In *Baker*, allegations of emotional disturbance, including severe depression, anxiety and suicidal ideation, coupled with physical injury, including incontinence and gastrointestinal issues, were sufficient, if proven, to establish the necessary unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury. *Baker, 299 Va. at 653–54, 857 S.E.2d at 588–89*.

- The Supreme Court of Virginia clarified the impact rule, stating that "where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact

is lacking, there can be no recovery for emotional disturbance alone." *Hughes, 214 Va. at 34, 197 S.E.2d at 219.* There may be recovery if there is a showing of a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury. *Id.*

- Pets are personal property, regardless of the position they occupy in human affection. One cannot recover damages for negligent infliction of emotional distress arising out of injury caused to a pet. Injury to a pet is compensated in diminution of the value of the property. *Kondaurov v. Kerdasha, 271 Va. 646, 656–58, 629 S.E.2d 181, 186–87 (2006).*

- Proof of negligent infliction of emotional distress requires two different standards of proof. The defendant's negligence must be proved by the greater weight of the evidence, but causation must be proved by clear and convincing evidence. *Myseros, 239 Va. at 9, 387 S.E.2d at 464*; *Hughes, 214 Va. 27 at 34, 197 S.E.2d at 219.* These standards of proof must be defined for the jury. See Instructions 3.100, Standard of Proof: Definition of Greater Weight of the Evidence, *and 3.110*, Standard of Proof: Definition of Clear and Convincing Evidence.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 18: Infliction of Mental Distress

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.11

Kent Sinclair, VIRGINIA REMEDIES, Chapter 16: Emotional Distress Claims

MICHIE'S JURISPRUDENCE, Damages § 43; Torts § 2

**Instruction No. 33.100**
**Negligent Infliction of Emotional Distress: Finding Instruction**

**You shall find your verdict for the plaintiff if he proved:**

**(1) by the greater weight of the evidence that the defendant was negligent; and**

**(2) by clear and convincing evidence that the defendant's negligence was a proximate cause of** [emotional distress; fright; shock] **which naturally resulted in a physical injury.**

**You shall find your verdict for the defendant:**

**(1) if the plaintiff failed to prove either or both of the two elements above; or**

**(2) if you find by the greater weight of the evidence that the plaintiff was negligent and that his negligence was a proximate cause of this injury.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Doe v. Baker, 299 Va. 628, 653–54, 857 S.E.2d 573, 588–89 (2021)*; *Anthony v. Verizon Virginia, Inc., 288 Va. 20, 38, 758 S.E.2d 527, 536–37 (2014)*; *Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 136–38, 523 S.E.2d 826, 833–34 (2000)*; *Gray v. INOVA Health Care Servs., 257 Va. 597, 599–600, 514 S.E.2d 355, 356–57 (1999)*; *Bowers v. Westvaco Corp., 244 Va. 139, 147–48, 419 S.E.2d 661, 666–67 (1992)*; *Fairfax Hosp. System, Inc. v. McCarty, 244 Va. 28, 37, 419 S.E.2d 621, 626–27 (1992)*; *Bulala v. Boyd, 239 Va. 218, 226 n.1, 232–33, 389 S.E.2d 670, 674 n.1, 677–78 (1990)*; *Hughes v. Moore, 214 Va. 27, 34–35, 197 S.E.2d 214, 219–20 (1973)*.

### Practice Commentary

See the Practice Commentary and Alerts in Instruction No. 33.000.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia, Chapter 18: Infliction of Mental Distress

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 26.11

Kent Sinclair, Virginia Remedies, Chapter 16: Emotional Distress Claims

Michie's Jurisprudence, Damages § 43; Torts § 2

## Instruction No. 33.200
## Intentional Infliction of Emotional Distress: Issues

**Your verdict must be based on the facts as you find them and on the law contained in these instructions.**

**The issues in this case are:**

(1) **Did the defendant** [have the specific purpose of inflicting emotional distress upon the plaintiff; intend his specific conduct and know, or should have known, that his conduct would likely result in emotional distress]**;**

(2) **Was the defendant's conduct outrageous and intolerable in that it offends the generally accepted standards of decency and morality;**

(3) **Did the plaintiff suffer severe emotional distress; and**

(4) **Was the plaintiff's severe emotional distress proximately caused by the defendant's conduct?**

**On these issues, the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Doe v. Baker, 299 Va. 628, 654–55, 857 S.E.2d 573, 589 (2021)*; *Viers v. Baker, 298 Va. 553, 564, 841 S.E.2d 857, 863 (2020)*; *SuperValu, Inc. v. Johnson, 276 Va. 356, 369–70, 666 S.E.2d 335, 343 (2008)*; *Almy v. Grisham, 273 Va. 68, 77–80, 639 S.E.2d 182, 186–88 (2007)*; *Harris v. Kreutzer, 271 Va. 188, 203–05, 624 S.E.2d 24, 33–34 (2006)*; *McDermott v. Reynolds, 260 Va. 98, 101, 530 S.E.2d 902, 903 (2000)*; *Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 136–37, 523 S.E.2d 826, 833 (2000)*; *Russo v. White, 241 Va. 23, 26–27, 400 S.E.2d 160, 162–63 (1991)*; *Womack v. Eldridge, 215 Va. 338, 340–42, 210 S.E.2d 145, 147–48 (1974)*.

## Practice Commentary

"[E]motional distress resulting from a non-tactile tort may be compensated if the plaintiff alleges, and proves by clear and convincing evidence, that: the wrongdoer's conduct is intentional or reckless; the conduct is outrageous and intolerable; the alleged wrongful conduct and emotional distress are causally connected; and the distress is severe." *Russo, 241 Va. at 26, 400 S.E.2d at 162*. To sustain a cause of action for intentional infliction of emotional distress, the plaintiff must allege and prove that the emotional distress was extreme and so severe that no reasonable person could be expected to endure it. *Id. at 27, 400 S.E.2d at 163*; see *Viers, 298 Va. at 564, 841 S.E.2d at 863*; *Almy, 273 Va. at 80, 639 S.E.2d at 188*; *Harris, 271 Va. at 205, 624 S.E.2d at 34*. In *Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 65–66, 645 S.E.2d 520, 526–27 (2007)*, the Supreme Court of Virginia upheld the trial court's sustaining of a demurrer, in part, on the grounds that the conduct complained of was "not so intolerable or outrageous" that it offended the "generally accepted standards of decency and morality."

The term "outrageous" does not objectively describe particular acts but instead represents an evaluation of behavior. *Viers, 298 Va. at 564, 841 S.E.2d at 863*; *Almy, 273 Va. at 78, 639 S.E.2d at 187*. The behavior alleged will not survive demurrer unless "it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized society." *Viers, 298 Va. at 564, 841 S.E.2d at 863* (Defendant Commonwealth's Attorney allegedly lying to another local official and local political activists about why he fired the plaintiff deemed not outrageous as a matter of law); see also *Baker, 299 Va. at 654–55, 857 S.E.2d at 589* (employer's failure to take corrective measures stronger than mandatory marital counseling in the face of broad and nonspecific allegations of a pastor's 40-year history of inappropriate and disturbing sexual conduct toward women did not rise to the level of being outrageous and intolerable); *Almy, 273 Va. at 78–79, 639 S.E.2d at 187*. When reasonable persons could view alleged conduct as outrageous, however, and the other elements of the tort are properly pleaded, the controversy must be resolved at a trial on the merits of the claim, rather than by a circuit court on demurrer. *Almy, 273 Va. at 79, 639 S.E.2d at 187*.

The tort of intentional infliction of emotional distress is directed at prohibiting conduct intended to cause personal, emotional damage to an individual, rather than conduct intended to cause economic damage to a business. *SuperValu, Inc., 276 Va. at 371, 666 S.E.2d at 344.*

Va. Code Ann. § 8.01-226.9 provides a merchant with limited immunity to civil liability for intentional infliction of emotional distress arising from the detention of a customer suspected of shoplifting. The immunity does not extend to conduct that is willful, wanton, or otherwise unreasonable or excessive. *Jury v. Giant of Maryland, Inc., 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997).*

***Interplay between the Workers' Compensation Act and the emotional distress tort.***—Recovery for an assault and battery occurring in the course of the injured person's employment is governed by the Workers' Compensation Act so long as the conduct is directed at the victim as an employee or if the conditions of employment are a contributing cause of the risk of injury. However, if the act is personal to the employee and is not directed against him as an employee or because of his employment, the injury does not arise out of the employment and is not governed by the Workers' Compensation Act. *Hilton v. Martin, 275 Va. 176, 180–81, 654 S.E.2d 572, 574–75 (2008).*

Va. Code Ann. § 65.2-301 provides that where the nature of the employment substantially increases the risk of assault, an employee who is sexually assaulted as defined in Va. Code Ann. §§ 18.2-61, 18.2-67.1, 18.2-67.3, or 18.2-67.4, and promptly reports the assault to a law enforcement authority has a valid claim for worker's compensation benefits upon a proper showing of damages; however, such employee who can identify the attacker may elect to pursue an action at law for damages. In *Butler v. Southern States Co-op., Inc., 270 Va. 459, 466–67, 620 S.E.2d 768, 772–73 (2005)*, the Supreme Court of Virginia held that an employee's assault by a co-worker, while arising "in the course of" her employment, was personal to the employee and not directed against her as an employee or because of her employment, and therefore did not "arise out of" her employment, making the exclusivity provisions of the Workers Compensation Act inapplicable. Consequently, her civil action for intentional infliction of emotional distress against the employer and co-employee was not barred. The court expressly declined to rule on the appellant's other assignment of error, to wit: that the election of remedies provided under Va. Code Ann. § 65.2-301 applied, on the grounds that appellant's first contention (that the assault did not "arise out of" her employment) was dispositive of the question whether the trial court erred in sustaining the special pleas in bar. *Id. at 464–67, 620 S.E.2d at 771–73.*

***PRACTICE POINTER:*** See Instruction No. 4.030, Definition of Gross Negligence, and Instruction No. 4.040, Definition of Willful and Wanton Conduct.

***ALERTS:***

• Va. Code Ann. § 8.01-220 bars an action for intentional infliction of emotional distress when the conduct complained of amounts to an action for alienation of affection. *McDermott, 260 Va. at 102–03, 530 S.E.2d at 904.*

However, where the plaintiff would have been compensated in damages even if plaintiff was unmarried, Va. Code Ann. § 8.01-220 does not bar the action. *Doe v. Zwelling, 270 Va. 594, 598–99, 620 S.E.2d 750, 752–53 (2005).*

• In *Almy*, the Court expressly declined to recognize a cause of action for civil conspiracy to intentionally inflict severe emotional distress. *273 Va. at 81, 639 S.E.2d at 189.*

• In some instances, the First Amendment bars a recovery for intentional infliction of emotional distress. *Snyder v. Phelps, 562 U.S. 443, 459 (2011)* (involving protesters with various signs and messages of public impact picketing on public land before a funeral for a Marine killed in the line of duty was to begin).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 18: Infliction of Mental Distress

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.11

Kent Sinclair, VIRGINIA REMEDIES, Chapter 16: Emotional Distress Claims

MICHIE'S JURISPRUDENCE, Damages § 43; Torts § 2

## Instruction No. 33.300
## Intentional Infliction of Emotional Distress: Finding Instruction

**You shall find your verdict for the plaintiff if he proved by clear and convincing evidence:**

(1) **that the defendant** [had the specific purpose of inflicting emotional distress upon the plaintiff; intended his specific conduct and knew, or should have known, that his conduct would likely result in emotional distress]**; and**

(2) **that the defendant's conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality; and**

(3) **that the plaintiff suffered severe emotional distress; and**

(4) **that the plaintiff's emotional distress was proximately caused by the defendant's conduct.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the four elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doe v. Baker, 299 Va. 628, 654–55, 857 S.E.2d 573, 589 (2021)*; *Viers v. Baker, 298 Va. 553, 564, 841 S.E.2d 857, 863 (2020)*; *SuperValu, Inc. v. Johnson, 276 Va. 356, 369–70, 666 S.E.2d 335, 343 (2008)*; *Almy v. Grisham, 273 Va. 68, 77–80, 639 S.E.2d 182, 186–88 (2007)*; *Harris v. Kreutzer, 271 Va. 188, 203–05, 624 S.E.2d 24, 33–34 (2006)*; *McDermott v. Reynolds, 260 Va. 98, 101, 530 S.E.2d 902, 903 (2000)*; *Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 136–37, 523 S.E.2d 826, 833 (2000)*; *Johnson v. Marcel, 251 Va. 58, 60, 465 S.E.2d 815, 817 (1996)*; *Russo v. White, 241 Va. 23, 26–27, 400 S.E.2d 160, 162–63 (1991)*; *Womack v. Eldridge, 215 Va. 338, 340–42, 210 S.E.2d 145, 147–48 (1974)*.

### PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 33.200, Intentional Infliction of Emotional Distress: Issues.

### *ALERTS:*

- See Alerts for Instruction No. 33.200, Intentional Infliction of Emotional Distress: Issues.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 18: Infliction of Mental Distress

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.11

Kent Sinclair, VIRGINIA REMEDIES, Chapter 16: Emotional Distress Claims

MICHIE'S JURISPRUDENCE, Damages § 43; Torts § 2

# Chapter 34

# PRODUCTS LIABILITY

## Scope Note


| | |
|---|---|
| Instruction No. 34.000 | Definition of Warranty |
| Instruction No. 34.010 | Notice of Breach |
| Instruction No. 34.020 | Express Warranty |
| Instruction No. 34.030 | Express Warranty: Creation by Advertisement, Sample or Description |
| Instruction No. 34.040 | Implied Warranty: Fitness for a Particular Purpose |
| Instruction No. 34.050 | Implied Warranty: Fitness for a Particular Purpose—Reliance |
| Instruction No. 34.060 | Implied Warranty: Merchantability |
| Instruction No. 34.070 | Implied Warranty: Merchantability—Labeling; Without Objection in the Trade |
| Instruction No. 34.075 | Breach of Warranty (Negligence) By Seller or Manufacturer |
| Instruction No. 34.076 | Unreasonably Dangerous Product |
| Instruction No. 34.080 | Unreasonably Dangerous or Not Fit for the Purpose for Which It Is Ordinarily Used [Merchantability: Allergic Users] |
| Instruction No. 34.090 | Common Law Implied Warranty: Wholesomeness of Food Products |
| Instruction No. 34.100 | Misuse or Unintended Use |
| Instruction No. 34.110 | Obvious Unfitness (Common Law) |
| Instruction No. 34.120 | Obvious Unfitness: Pre-Contract (Statutory) |
| Instruction No. 34.130 | Obvious Unfitness: Post-Contract (Statutory) |
| Instruction No. 34.140 | Manufacturer's Duty: Design and Construction |
| Instruction No. 34.150 | Manufacturer's and Seller's Duty to Warn: General |
| Instruction No. 34.155 | Manufacturer's Duty to Warn: Medications |
| Instruction No. 34.160 | [RESERVED] |
| Instruction No. 34.170 | Seller's Duty: Inspect or Test |
| Instruction No. 34.180 | Negligence *Per Se* (Example for Pesticide) |
| Instruction No. 34.190 | Unsafe Use of Product |
| Instruction No. 34.200 | Misuse or Unintended Use of Product |
| Instruction No. 34.300 | Motor Vehicle Warranty Enforcement Act: Manufacturer's and Dealer's Duty to Conform to Warranty |
| Instruction No. 34.310 | Motor Vehicle Warranty Enforcement Act: Presumption of Significant Impairment |

**Instruction No. 34.320 Motor Vehicle Warranty Enforcement Act: Definition of Warranty**

# SCOPE NOTE

The general instructions in this chapter cover the three causes of action recognized by Virginia law for products liability actions: express warranty, implied warranty, and negligence. At the end of the chapter is a set of instructions on the Motor Vehicle Warranty Enforcement Act. Although the warranty causes of action accomplish most of the same results, strict tort liability has not been recognized. *Harris v. T.I., Inc., 243 Va. 63, 71, 413 S.E.2d 605, 609–10 (1992).* The doctrine of res ipsa loquitur applies in limited circumstances where the incident could only have been caused by negligence of the defendant and evidence is not available. *Lewis v. Carpenter Co., 252 Va. 296, 300, 477 S.E.2d 492, 494 (1996).*

In order for the buyer to recover on a breach of warranty claim, the buyer must notify the seller of the breach. The notice requirement does not apply to a person that was not a buyer of the goods. *Yates v. Pitman Mfg., Inc., 257 Va. 601, 605, 514 S.E.2d 605, 607 (1999).*

Lack of privity is not a defense to claims for personal injury and property damage. Va. Code Ann. §§ 8.01-223, 8.2-318; *Copenhaver v. Rogers, 238 Va. 361, 366, 384 S.E.2d 593, 595 (1989).* In an action in tort for solely economic loss, however, the Supreme Court of Virginia has said Va. Code Ann. § 8.01-223 does not eliminate privity as a defense. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 423, 374 S.E.2d 55, 57 (1988).*

Instruction No. 34.000 defines the term "warranty." Instruction No. 34.010 addresses the duty of a plaintiff to provide notice that the warranty has been breached.

There are three instructions covering the ways in which a seller or manufacturer may create warranties for a particular product. "Seller" includes manufacturers unless the context indicates otherwise. Instruction No. 34.020 covers express warranties by the seller. Express warranties are oral or written statements by the seller about his product which become part of the basis of the bargain between the buyer and seller. Instruction No. 34.030 explains that an express warranty may also be created by advertising the product. Instruction No. 34.040 concerns implied warranties of fitness for a particular purpose. The seller gives an implied warranty when he knows that the buyer intends to use the product for a particular purpose and that the buyer is relying on the seller's judgment that the product is fit for that purpose. Instruction No. 34.050 lists considerations which should be taken into account in determining whether the seller knew that the buyer relied on the seller's judgment of fitness.

There are two instructions covering implied warranties generally, and one instruction concerning the warranty implied in the sale of food. These warranties accompany every sale unless specifically disclaimed by the seller. There is no instruction on what constitutes an adequate disclaimer because there is too much factual diversity to make a model instruction worthwhile. Instruction No. 34.060 covers the implied warranty of merchantability that the seller's product is fit for the purposes for which it is ordinarily used. Causes of actions based on the general implied warranty of merchantability may overlap with certain specific warranties such as the warranty of fitness for a particular purpose, Instruction No. 34.040, or the common law warranty of wholesomeness of food products, Instruction No. 34.090. An unfit product may also give rise to causes of action based on negligence.

Instruction No. 34.070 covers the statutory implied warranty that the seller's product is contained, packaged, and labeled adequately. Instruction No. 34.080 concerns the problem of allergic users and states that a product which contains an ingredient that is foreseeably dangerous to an identifiable group of people is not merchantable unless the manufacturer gave an adequate warning of the danger. The law imposes liability on the seller for the sale of an unmerchantable product; it does not address the issue of whether the seller in this situation may also have a cause of action against the manufacturer. Instruction No. 34.090 covers the common law warranty that food or beverage offered for sale to the public is free of foreign substances and fit for human consumption. A cause of action resulting from a sale of unwholesome food or beverage may also involve a violation of the Virginia Food Act. Va. Code Ann. § 3.2-5126 *et seq.*

The standard of safety of goods imposed on the seller or manufacturer of a product under the warranty theory of liability is set forth in Instruction No. 34.075. The definition of an unreasonably dangerous product which is required to prove a violation of the standard of safety of goods is set forth in Instruction No. 34.076. These instructions may also be used to instruct under a negligence theory in a products liability action.

There are four instructions which limit the seller's liability by imposing a duty on the buyer to act reasonably. Instruction No. 34.100 concerns the affirmative defense of misuse or unintended use. This is a common law rule prohibiting recovery based on a breach of warranty if the plaintiff misused the product or used it in a way not reasonably foreseeable by the defendant. Instruction No. 34.110 covers the common law rule that the seller makes no implied warranties of fitness or wholesomeness when the unfitness or unwholesomeness of the product is known, visible, or obvious to the buyer upon ordinary examination. Instruction No. 34.120 covers the statutory affirmative defense of pre-contract obvious unfitness. The rule applies when the buyer examines or refuses to examine the product before purchasing it. The rule is that the seller makes no implied warranty as to defects that should have been revealed by an examination. Instruction No. 34.130 concerns post-contract obvious unfitness; it prohibits recovery where the defendant proves that the plaintiff actually discovered the product was unfit before using it.

The negligence instructions are based on a manufacturer's or a seller's common law duty to exercise due care to protect consumers from harmful or defective products. The instructions point out that the common law places a greater burden on the manufacturer of a product because the manufacturer is usually in a better position to detect and prevent dangerous defects in products. Instruction No. 34.140 covers the manufacturer's basic duty to design or construct reasonably safe products. Instruction No. 34.150 concerns the general duty of both the seller and manufacturer to give adequate warnings of the potential hidden dangers associated with their products. Instruction No. 34.155 specifies the duty of a drug manufacturer to warn physicians of possible dangers to patients who use the drug. Instruction No. 34.170 concerns the seller's duty, when he knows or has reason to know that a product is likely to be defective or dangerous, to make reasonably necessary tests or inspections to be sure the product is safe for its intended use. Instruction No. 34.180 is appropriate when a manufacturer violates a statute establishing a duty to label pesticides, and it may be modified for similar violations of statutes regulating drugs and food products.

The plaintiff's duties to exercise due care to protect himself are covered in two

instructions. Instruction No. 34.190 states that unsafe use is contributory negligence. Contributory negligence is no defense to a breach of warranty action; a knowing use of an unfit product permits the defense of post-contract obvious unfitness in a warranty action. See Instruction No. 34.130. Instruction No. 34.200 states that misuse or unforeseeable use bars recovery. This defense is also appropriate in a breach of warranty action. See Instruction No. 34.100.

Warranty provisions of the UCC do not apply to chattel leases. *Leake v. Meredith, 221 Va. 14, 16–17, 267 S.E.2d 93, 94–95 (1980).*

*Motor Vehicle Warranty Enforcement Act*

Instruction Nos. 34.300, 34.310, and 34.320 are based on the Motor Vehicle Warranty Enforcement Act, Va. Code Ann. § 59.1-207.9 et seq. The Act includes legislative intent (§ 59.1-207.10), relevant definitions (§ 59.1-207.11), notice requirements (§ 59.1-207.13(E)), and limitations of § 59.1-207.11 actions (§ 59.1-207.16). Attorney's fees, expert witness fees, and court costs are recoverable. Va. Code Ann. § 59.1-207.14. Rights and remedies under the Motor Vehicle Warranty Enforcement Act are in addition to other rights and remedies a consumer may have. Va. Code Ann. § 59.1-207.10; Va. Code Ann. § 59.1-207.13(F).

Instruction No. 34.300 sets out the manufacturer's and dealer's duty to conform the vehicle to any applicable warranty and covers the choices available to the consumer when the vehicle is defective. Instruction No. 34.310 contains the presumption of significant impairment, and Instruction No. 34.320 defines warranty under the Act. These instructions are not intended to cover all suits that might be brought under the Act but are provided as drafting models for translating statutory language into instructions.

**Instruction No. 34.000**
**Definition of Warranty**

**A warranty is a promise or guarantee by a manufacturer or seller that the product is of a certain quality or character. There are several different kinds of warranties; you will receive instructions on each type of warranty that you need to consider. The word "seller" means a person who sells or contracts to sell goods.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-103(1)(d).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This is a preliminary instruction to be given in all product liability cases in which a breach of warranty is alleged.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.010
## Notice of Breach

**The plaintiff must prove by the greater weight of the evidence that he gave notice to the seller of the claimed breach of warranty within a reasonable time after he discovered, or should have discovered, it. If the plaintiff fails to do so, he cannot recover.**

[Notice need not be in any particular form. Notice is sufficient if it informs the seller that the buyer claims there has been a breach of warranty so that the seller and buyer may attempt to settle their differences.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-607(3)(a).

**CASE AUTHORITY:** *Yates v. Pitman Mfg., Inc., 257 Va. 601, 514 S.E.2d 605 (1999).*

### PRACTICE COMMENTARY

"Seller" has been used for ease of drafting; the term "seller" includes a manufacturer.

The reasonableness of the timeliness of notice between merchants is to be judged by commercial standards. When the buyer is a retail consumer, this time period should be extended and judged by the more relaxed standard of reasonableness. Va. Code Ann. § 8.2-607, Official Comment 4.

☞ ***PRACTICE POINTER:*** The second paragraph of this Instruction is optional. It is based directly on Va. Code Ann. § 8.2-607, Official Comment 4.

### *ALERTS:*

- This instruction applies only where tender of the product has been accepted by the buyer. Va. Code Ann. § 8.2-607(3).

- This instruction should be given only if the plaintiff is the buyer of the product. Only the buyer must give notice of breach of warranty to the seller. Notice is not required of a plaintiff who is not a buyer. *Yates, 257 Va. at 605, 514 S.E.2d at 606–07.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.020
## Express Warranty

**When a seller makes a statement, either orally or in writing, which relates to the goods and becomes a part of the basis of the bargain, he creates an express warranty that the product will conform to his statement.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-313(1)(a).

**CASE AUTHORITY:** *Royal Indem. Co. v. Tyco Fire Prods., LP, 281 Va. 157, 170, 704 S.E.2d 91, 97–98 (2011)*; *Yates v. Pitman Mfg., Inc., 257 Va. 601, 606, 514 S.E.2d 605, 607 (1999)*; *Daughtrey v. Ashe, 243 Va. 73, 76–78, 413 S.E.2d 336, 337–38 (1992)*; *Van Duyn v. Matthews, 181 Va. 256, 260–61, 24 S.E.2d 442, 443–44 (1943)*; *Newbern v. Joseph Baker & Co., Inc., 147 Va. 996, 1004, 133 S.E. 500, 502 (1926).*

## PRACTICE COMMENTARY

Although pre-Code cases required the plaintiff to prove that he actually relied on the seller's affirmations, no such requirement appears in the UCC. The plaintiff must show only that the affirmations were part of the "basis of the bargain." Va. Code Ann. § 8.2-313, Official Comment 3; *Yates, 257 Va. at 606, 514 S.E.2d at 607–608*; *Daughtrey, 243 Va. at 80, 413 S.E.2d at 339.*

Pre-Code cases indicate that an express warranty is created only if the seller by his affirmations of facts intends to create a warranty. *Carney v. Sears, Roebuck & Co., 309 F.2d 300, 305 (4th Cir. 1962).* Under the UCC, however, it is not required that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to create a warranty if any of the statements become part of the basis of the bargain. Va. Code Ann. § 8.2-313, Official Comment 3. A statement that is merely the seller's opinion or commendation of the goods does not create a warranty. Va. Code Ann. § 8.2-313(2).

A description of the goods, such as an appraisal of jewelry, can become the "basis of the bargain" and an express warranty, unless there is clear affirmative proof that takes it out of the agreement. *Daughtrey, 243 Va. at 78, 413 S.E.2d at 338–39.* However, a description of how sprinkler heads operate contained in a technical data sheet was held not to be sufficient to constitute an express warranty. *Royal Indem. Co., 281 Va. at 171, 704 S.E.2d at 98.*

Where the seller has knowingly made a false statement as to quality or condition, the plaintiff may have a remedy in fraud or misrepresentation. Va. Code Ann. § 8.2-313, Official Comment 8. *C.E. Wright & Co., Inc. v. Shackleford, 152 Va. 635, 643, 148 S.E. 807, 809 (1929).* See Instructions, Chapter 39, Fraud. The plaintiff may also have a remedy under the Virginia Consumer Protection Act, Va Code Ann. §§ 59.1-196–59.1-207.

☞ ***PRACTICE POINTER:*** Express warranties also may be created by advertisements or by the use of samples or descriptions of the product. In such a case, Instruction No. 34.030, Express Warranty: Creation by Advertisement, Sample, or Description, should be used.

## *ALERTS:*

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.030
## Express Warranty: Creation by Advertisement, Sample or Description

**When a seller gives a description of the** [goods; product; (name of product)]**, orally or in writing, which relates to the** [goods; product; (name of product)] **and becomes a part of the basis of the bargain, he creates an express warranty that the** [goods; product; (name of product)] **shall conform to the description.**

[When a seller provides a sample or model of the [goods; product; (name of product)] which relates to the [goods; product; (name of product)] and becomes a part of the basis of the bargain, he creates an express warranty that the [goods; product; (name of product)] shall conform to the sample or model.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-313(1)(b)–(c).

**CASE AUTHORITY:** *Daughtrey v. Ashe, 243 Va. 73, 76–78, 413 S.E.2d 336, 337–38 (1992); McNeir v. Greer-Hale Chinchilla Ranch, 194 Va. 623, 627, 74 S.E.2d 165, 168 (1953).*

### PRACTICE COMMENTARY

A description of the goods, such as an appraisal of jewelry, can become the "basis of the bargain" and an express warranty unless there is clear affirmative proof that takes it out of the agreement. *Daughtrey, 243 Va. at 78, 413 S.E.2d at 338–39.*

A seller may not condition coverage, performance, or duration of a warranty upon the return of a warranty registration card unless such a requirement is conspicuously disclosed in advertising and marketing materials that reference the goods' warranty. Va. Code Ann. § 8.2-317.1.

The first paragraph of the instruction should be used if an advertisement or other description is made part of the basis of the bargain. The bracketed paragraph of the instruction should be used if a sample or model is made part of the basis of the bargain.

### *ALERTS:*

- A seller's or manufacturer's commendation or opinion of the goods in an advertisement or description does not create an express warranty. Va. Code Ann. § 8.2-313(2); *Bayliner Marine Corp. v. Crow, 257 Va. 121, 127–28, 509 S.E.2d 499, 502–03 (1999).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.040
## Implied Warranty: Fitness for a Particular Purpose

**When a seller knows, or has reason to know, that the product he is selling is to be used for a particular purpose and that the buyer is relying on the seller's skill or judgment in selecting or furnishing a product suitable for that purpose, then the seller creates an implied warranty that the product will be fit for that particular purpose.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-315.

**CASE AUTHORITY:** *Bayliner Marine Corp. v. Crow, 257 Va. 121, 129, 509 S.E.2d 499, 503 (1999)*; *Medcom, Inc. v. C. Arthur Weaver Co., Inc., 232 Va. 80, 84–85, 348 S.E.2d 243, 246 (1986)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 963–64, 252 S.E.2d 358, 367 (1979)*; *Layne-Atlantic Co. v. Koppers Co., Inc., 214 Va. 467, 471, 201 S.E.2d 609, 613 (1974)*; *H.M. Gleason & Co. v. Int'l Harvester Co., 197 Va. 255, 261, 88 S.E.2d 904, 908 (1955)*; *Greenland Dev. Corp. v. Allied Heating Prods. Co., 184 Va. 588, 597, 35 S.E.2d 801, 805 (1945)*.

### PRACTICE COMMENTARY

In some cases, the implied warranty of fitness for a particular purpose may overlap with the implied warranty of merchantability. See Instruction No. 34.060, Implied Warranty: Merchantability.

The particular purpose may be shown from the circumstances of the sale as well as from the terms of the agreement. Va. Code Ann. § 8.2-315, Official Comment 1.

The seller may exclude or modify an implied warranty of fitness for a particular purpose. Va. Code Ann. § 8.2-316.

☞ ***PRACTICE POINTER:*** If reliance is an issue, see also Instruction No. 34.050, Implied Warranty: Fitness for a Particular Purpose—Reliance. If the evidence indicates that the plaintiff did not use the product in the manner contemplated, see also Instruction No. 34.100, Misuse or Unintended Use.

"The appropriate standard in Virginia is whether a manufacturer has a reason to know, not whether the manufacturer should know." *Owens-Corning Fiberglass Corp. v. Watson, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992)*.

### *ALERTS:*

This instruction previously imposed liability based on a "knows or should have known" standard. However, "reason to know" implies no duty of knowledge that the actor owes another the duty of ascertaining the fact in question." *Owens-Corning Fiberglass Corp. v. Watson, 243 Va. at 135, 413 S.E.2d at 635*; see also *Funkhouser v. Ford Motor Co., 285 Va. 272, 283, n.5, 736 S.E.2d 309, 315 n.5 (2013)*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.050**

**Implied Warranty: Fitness for a Particular Purpose—Reliance**

**In deciding whether the seller has reason to know that the buyer was relying on the seller's skill or judgment, you should consider all the facts surrounding the sale, including:**

**(1) whether the buyer had any control over the selection of the product;**

**(2) whether the buyer insisted on a particular brand or product;**

**(3) whether the buyer gave detailed and complete specifications for the product; and**

**(4) any other relevant circumstances.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-315, 8.2-316. See Official Comment to cited sections.

**CASE AUTHORITY:** *Layne-Atlantic Co. v. Koppers Co., Inc., 214 Va. 467, 474–75, 201 S.E.2d 609, 615 (1974)*; *Greenland Dev. Corp. v. Allied Heating Prods. Co., Inc., 184 Va. 588, 597–98, 35 S.E.2d 801, 805 (1945).*

### PRACTICE COMMENTARY

A buyer's insistence on particular brands or products and a buyer's provision of detailed and complete specifications are indications of nonreliance but are not dispositive since the weight to be given to the facts is a matter for the jury.

### *ALERTS:*

- This instruction is to be used in conjunction with Instruction No. 34.040, Implied Warranty: Fitness for Particular Purpose, and should not be used independently.

- This instruction previously imposed liability based on a "knows or should have known" standard. However, "reason to know" implies no duty of knowledge that the actor owes another the duty of ascertaining the fact in question." *Owens-Corning Fiberglass Corp. v. Watson, 243 Va. at 135, 413 S.E.2d at ___*; see also *Funkhouser v. Ford Motor Co., 285 Va. 272, 283, n.5, 736 S.E.2d 309, n.5 (2013).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.060**
**Implied Warranty: Merchantability**

**There is an implied warranty by a seller that his product will be fit for the purposes for which it is ordinarily used.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-314(1), 8.2-314(2)(c).

**CASE AUTHORITY:** *Holiday Motor Corp. v. Walters, 292 Va. 461, 477–78, 790 S.E.2d 447, 455 (2016)*; *Hyundai Motor Co., Ltd. v. Duncan, 289 Va. 147, 156 n.8, 766 S.E.2d 893, 898 n.8 (2015)*; *Bayliner Marine Corp. v. Crow, 257 Va. 121, 128, 509 S.E.2d 499, 503 (1999)*; *Garrett v. I.R. Witzer Co., Inc., 258 Va. 264, 267, 518 S.E.2d 635, 637 (1999)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 963, 252 S.E.2d 358, 367 (1979)*; *Logan v. Montgomery Ward & Co., Inc., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)*; *Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 252, 217 S.E.2d 863, 869 (1975).*

### PRACTICE COMMENTARY

The seller may exclude or modify an implied warranty of merchantability. Va. Code Ann. § 8.2-316.

In some cases, the warranty of merchantability may overlap with the warranty of fitness for a particular purpose. See Instruction No. 34.040, Implied Warranty: Fitness for a Particular Purpose.

An unfit product may also give rise to a common law negligence action. See Instructions No. 34.075, Breach of Warranty (Negligence) by Seller or Manufacturer, No. 34.076, Definition of Unreasonably Dangerous Product, and No. 34.140, Manufacturer's Duty: Design and Construction.

An unwholesome food product also will breach the common law warranty of wholesomeness. See Instruction No. 34.090, Common Law Implied Warranty: Wholesomeness of Food Products.

In order to establish that a product is not merchantable, the plaintiff must first establish the standard of merchantability in the trade. *Bayliner, 257 Va. at 128, 509 S.E.2d at 503.*

☞ ***PRACTICE POINTER:*** In order to recover for alleged economic loss, including consequential damages, there must have been a contract. *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 246, 491 S.E.2d 731,734 (1997).*

There is no liability under the implied warranty of fitness for a particular purpose when there has been unforeseeable misuse of the product. *Besser Co. v. Hansen, 243 Va. 267, 277, 415 S.E.2d 138, 144 (1992).*

### *ALERTS:*

- Instruction No. 34.075, Breach of Warranty (Negligence) by Seller or Manufacturer, and Instruction No. 34.076, Definition of Unreasonably Dangerous Product, should be given with this instruction.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.070
## Implied Warranty: Merchantability—Labeling; Without Objection in the Trade

**There is an implied warranty by the seller that the product** [will pass without objection in the trade under the contract description; is adequately contained, packaged, and labeled as the agreement may require; conforms to the promises or affirmations of fact made on the container or label]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-314(1), 8.2-314(2)(a), (e), (f).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The brackets contain some of the categories of implied warranty of merchantability that may apply in the case. The implied warranty that fits the facts of the case should be selected. Also, the other categories of the implied warranty of merchantability set forth in Va. Code Ann. § 8.2-314(2) should be reviewed to determine whether they are applicable to the facts in the case.

Note that Instruction No. 34.060, Implied Warranty: Merchantability, contains the implied warranty of fitness for the ordinary purposes for which the product is used under Va. Code Ann. § 8.2-314(2)(c).

Va. Code Ann. §§ 3.2-3938, 3.2-5123, 54.1-3462, and 54.1-3465 give the statutory labeling requirements for pesticides, food, drugs, and cosmetics, respectively. Violation of these statutes may give rise to an action in negligence and constitute negligence *per se*. See Instruction No. 34.180, Negligence *Per Se*.

☞ ***PRACTICE POINTER:*** This instruction will apply to situations in which the buyer alleges that the seller's failure to warn of foreseeable dangers renders the product defective, and thus unmerchantable.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.075
## Breach of Warranty (Negligence) By Seller or Manufacturer

**The defendant** [seller; manufacturer] **has breached the implied warranty that the product is fit for the purposes for which it is ordinarily used if the plaintiff proves by a preponderance of the evidence that the product was unreasonably dangerous either for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose, and that the unreasonably dangerous condition existed when the product left the defendant** [seller's; manufacturer's] **hands.**

[The defendant is negligent if the plaintiff proves by a preponderance of the evidence that the product was unreasonably dangerous either for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose, and that the unreasonably dangerous condition existed when the product left the defendant [seller's; manufacturer's] hands.]

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Holiday Motor Corp. v. Walters, 292 Va. 461, 477–78, 790 S.E.2d 447, 455–56 (2016)*; *Garrett v. I.R. Witzer Co., Inc., 258 Va. 264, 267–68, 518 S.E.2d 635, 637 (1999)*; *Jeld-Wen, Inc. v. Gamble, 256 Va. 144, 148, 501 S.E.2d 393, 396 (1998)*; *Morgen Indus., Inc. v. Vaughan, 252 Va. 60, 65, 471 S.E.2d 489, 492 (1996)*; *Besser Co. v. Hansen, 243 Va. 267, 277–78, 415 S.E.2d 138, 144 (1992)*; *Harris-Teeter, Inc. v. Burroughs, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991)*; *Logan v. Montgomery Ward & Co., Inc., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)*.

## Practice Commentary

The cases cited above have used this instruction with theories of implied warranty of merchantability, negligence, and common law implied warranty of wholesomeness of food products (Instruction No. 34.090). Consideration should be given to using this instruction along with instructions for implied warranty for a particular purpose (Instruction No. 34.040), and express warranty (Instruction No. 34.030).

## *ALERTS:*

- This instruction should be used to instruct on the standard of safety of goods imposed on a seller or manufacturer of a product under either a warranty theory or a negligence theory. If the case is brought under the theory of both breach of warranty and negligence, this instruction should be given for both causes of action.

## *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Chapter 29

Kent Sinclair, Virginia Remedies §§ 28-1 through 28-8, 74-5

Michie's Jurisprudence, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.076**
**Unreasonably Dangerous Product**

**A product is unreasonably dangerous if it is defective in design, assembly or manufacture, or if it is unaccompanied by adequate warnings concerning its hazardous properties.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Evans v. NACCO Materials Handling Grp., Inc., 295 Va. 235, 246–47, 810 S.E.2d 462, 469–70 (2018)*; *Holiday Motor Corp. v. Walters, 292 Va. 461, 790 S.E.2d 447 (2016)*; *Morgen Indus., Inc. v. Vaughan, 252 Va. 60, 65, 471 S.E.2d 489, 492 (1996).*

### PRACTICE COMMENTARY

To sustain a claim for negligent design, "a plaintiff must show that the manufacturer failed to meet objective safety standards prevailing at the time the product was made." *Holiday Motor, 292 Va. at 478 n.14, 790 S.E.2d at 455 n.14.* Applicable industry standards, applicable government standards, and reasonable consumer expectations are relevant to whether a design was negligent, but they are not dispositive. See *Evans, 295 Va. at 247, 810 S.E.2d at 467*; *Redman v. John D. Brush & Co., 111 F.3d 1174, 1177–78 (4th Cir. 1997).*

See PRACTICE COMMENTARY to Instruction No. 34.075.

### *ALERTS:*

- This instruction should be used in conjunction with Instruction No. 34.075, Breach of Warranty (Negligence) By Seller or Manufacturer. See *Alerts* for Instruction No. 34.075.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.080
## Unreasonably Dangerous or Not Fit for the Purpose for Which It Is Ordinarily Used [Merchantability: Allergic Users]

**Some products may be safe for use by most people and yet harmful to others. If the product contains an ingredient that is harmful to an identifiable or substantial class of users, and if the manufacturer reasonably could foresee that danger, the product is unreasonably dangerous [or not fit for the purpose for which it is ordinarily used]** [unless the manufacturer gave an adequate warning of the danger]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Although no Virginia cases were found on point, this appears to be the general rule. See, e.g., *Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 355–58, 378 P.2d 298, 303–05 (1963)*; *Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 466–67, 162 A.2d 513, 516 (1960).*

The word "manufacturer" is used here rather than "seller" because the manufacturer is more likely to be sued in this type of case. Also, the manufacturer is more likely able to foresee the danger. The seller is nonetheless liable under the law of this instruction.

The plaintiff has the burden of proving that the product contains an ingredient that is harmful. The manufacturer has the burden of proving that an adequate warning was given. See Va. Code Ann. §§ 3.2-5122 (adulterated food), 3.2-5123 (misbranded food).

☞ ***PRACTICE POINTER:*** See Chapter 3, Issues, Burden of Proof and Finding Instructions.

### ***ALERTS:***

- Not every case will involve both issues. Use the bracketed phrase only when adequate warning is an issue. On the duty to warn, see Instruction No. 34.150, Manufacturer's and Seller's Duty to Warn: General.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.090
## Common Law Implied Warranty: Wholesomeness of Food Products

**When a person offers food or beverage for sale to the public, he warrants that the food or beverage is free of foreign substances and is fit for human consumption.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 3.2-5120–3.2-5128, 8.2-314.

**CASE AUTHORITY:** *Bussey v. E.S.C. Restaurants, Inc., 270 Va. 531, 536, 620 S.E.2d 764, 767 (2005)*; *Harris-Teeter, Inc. v. Burroughs, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991)*; *Levy v. Paul, 207 Va. 100, 105, 147 S.E.2d 722, 725–26 (1966)*; *Brockett v. Harrell Bros., Inc., 206 Va. 457, 461, 143 S.E.2d 897, 901 (1965)*; *Swift & Co. v. Wells, 201 Va. 213, 217, 110 S.E.2d 203, 206 (1959).*

## PRACTICE COMMENTARY

In the context of unwholesome food, the proof necessary to sustain a cause of action for negligence and breach of warranty is the same. The plaintiff must show (1) that the food was unreasonably dangerous either for the use to which it would be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the food left the defendant's hands. *Bussey, 270 Va. at 536, 620 S.E.2d at 767.* Therefore, Instruction No. 34.075, Breach of Warranty (Negligence) By Seller or Manufacturer, should be used with this instruction.

This instruction applies to all persons who sell food products, including processors, retailers, manufacturers, and restaurant keepers. See Va. Code Ann. § 8.2-314, Official Comment 5.

No distinction is made between sealed and unsealed goods provided the plaintiff can prove that the product was unwholesome when it left the manufacturer. *Brockett, 206 Va. at 460–61, 143 S.E.2d at 901.* In a cause of action under the Virginia Food Act, Va. Code Ann. § 3.2-5126 *et seq.*, for negligence *per se*, the manufacturer violates the statute when it delivers adulterated food to the retailer.

## *ALERTS:*

- Presence of a foreign substance in a sealed container was treated in older cases as giving rise to a presumption of prima facie negligence, rebuttable by evidence that defendant exercised due care in the processing of the food product. Due care is immaterial to a cause of action brought in breach of common law or Code warranties, or in negligence *per se* under the Virginia Food Act, which prohibits manufacture, delivery, or sale of adulterated food products. Va. Code Ann. § 3.2-5126. See also Instruction No. 34.180, Negligence *Per Se*.

## *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.100**
**Misuse or Unintended Use**

**A plaintiff cannot recover for breach of a warranty if he misused the product in a way not reasonably foreseeable by the defendant.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Cooper v. Melendez, 260 Va. 578, 590, 537 S.E.2d 580, 587 (2000)*; *Jeld-Wen, Inc. v. Gamble by Gamble, 256 Va. 144, 144, 501 S.E.2d 393, 396 (1998)*; *Wood v. Bass Pro Shops, Inc., 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995)*; *Besser Co. v. Hansen, 243 Va. 267, 277–78, 415 S.E.2d 138, 144 (1992)*; *White Consol. Indus., Inc. v. Swiney, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979)*; *Layne-Atlantic Co. v. Koppers Co., Inc., 214 Va. 467, 473, 201 S.E.2d 609, 614 (1974)*.

### PRACTICE COMMENTARY

This instruction applies to breach of implied warranty. *Wood, 250 Va. at 301, 462 S.E.2d at 103*.

Neither contributory negligence nor assumption of the risk is a defense in an action based on breach of implied warranty. *Wood, 250 Va. at 301, 462 S.E.2d at 103*. See *Jones v. Ford Motor Co., 263 Va. 237, 261, 559 S.E.2d 592, 605 (2002)*.

### *ALERTS:*

- The Supreme Court of Virginia has not expressly resolved whether misuse is an affirmative defense that must be pled. While there is case law suggesting that the plaintiff has the burden of proving that the product was used as intended or that the manner of use was foreseeable, this has not been definitively resolved. See, e.g., *Jeld-Wen, Inc., 256 Va. at 147–48, 501 S.E.2d at 396*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.110
## Obvious Unfitness (Common Law)

**When there has been an examination of the product by the buyer before purchase and the** [unfitness; unwholesomeness] **of the product becomes known to the buyer or is visible or obvious, there is no implied warranty of** [fitness; wholesomeness]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Wood v. Bass Pro Shops, Inc., 250 Va. 297, 301, 462 S.E.2d 101, 103 (1995)*; *Brockett v. Harrell Bros., Inc., 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965).*

### PRACTICE COMMENTARY

This instruction applies to breach of implied warranty. *Wood, 250 Va. at 301, 462 S.E.2d at 103.*

The instruction is applicable only in those situations where plaintiff has an opportunity to inspect the product before contracting or purchasing. The warranty would not be excluded when the product is sold in a sealed container, nor would recovery be barred when it is the discovery of the "defect" subsequent to purchase that makes plaintiff ill, e.g., the very sight of a mouse in a soda bottle.

This is an affirmative defense, and the burden of proving the obvious nature of the defect is on the defendant. The jury must be instructed on this in the issue instruction and the finding instruction. See Chapter 3, Issues, Burden of Proof and Finding Instructions.

Neither contributory negligence nor assumption of the risk is a defense in an action based on breach of implied warranty. *Wood, 250 Va. at 301, 462 S.E.2d at 103.* See *Jones v. Ford Motor Co., 263 Va. 237, 261, 559 S.E.2d 592, 605 (2002).*

### *ALERTS:*

- The instruction is not applicable where a cause of action is brought in implied warranty under the UCC. See Instruction Nos. 34.130 and 34.190, Statutory Obvious Unfitness: Post-Contract and Unsafe Use of Product, respectively.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.120
## Obvious Unfitness: Pre-Contract (Statutory)

**When the buyer** [examines the product as fully as he desires; refuses to examine the product] **before purchasing the product, there is no implied warranty as to defects that the examination** [should; would] **have revealed under the circumstances.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-316(3)(b).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This instruction applies to breach of an implied warranty. Va. Code Ann. § 8.2-316(3)(b).

The instruction is applicable only to pre-contract examination of the goods. "Examination" is not synonymous with inspection before acceptance or at any other time after the contract has been made. Va. Code Ann. § 8.2-316, Official Comment 8. See also Instruction No. 34.130, Obvious Unfitness: Post-Contract (Statutory).

This instruction differs from common law doctrine. Under the UCC, the issue is not only whether the buyer examined the goods, but also whether he refused to examine the goods. Va. Code Ann. § 8.2-316(3)(b). The common law rule is set forth in Instruction No. 34.110, Obvious Unfitness (Common Law).

☞ ***PRACTICE POINTER:*** Pre-contract examination is an affirmative defense. The burden of proof is upon the defendant to establish that defense. The jury must be advised of this in the issue instruction and the finding instruction. See Chapter 3, Issues, Burden of Proof and Finding Instructions.

### *ALERTS:*

- See *Twin Lakes Mfg. Co. v. Coffey, 222 Va. 467, 472–73, 281 S.E.2d 864, 867 (1981)*, for the latent defect exception to this rule.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.130**
**Obvious Unfitness: Post-Contract (Statutory)**

**If you believe by the greater weight of the evidence that the plaintiff** [discovered the product was unfit before he used it; unreasonably failed to inspect the product when an inspection would have revealed the defect]**, then the plaintiff's injury was not proximately caused by breach of the implied warranty and he cannot recover.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-316, Official Comment 8, 8.2-715, Official Comment 5.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The instruction is to be used only when the opportunity to inspect arises after the contract has been made. If a pre-contract examination is at issue, Instruction No. 34.120, Obvious Unfitness: Pre-Contract (Statutory), should be used.

### *ALERTS:*

- Obvious unfitness is an affirmative defense; the defendant has the burden of proof. The jury should be instructed on this in the issue instruction and the finding instruction. See Chapter 3, Issues, Burden of Proof and Finding Instructions.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.140
## Manufacturer's Duty: Design and Construction

**A manufacturer has a duty to use ordinary care to** [design; manufacture; construct; assemble] **a product that will be reasonably safe for its intended purpose and for any other reasonably foreseeable purpose.**

**If a manufacturer fails to perform this duty, then it is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Holiday Motor Corp. v. Walters, 292 Va. 461, 477, 790 S.E.2d 447, 455 (2016)*; *Garrett v. I.R. Witzer Co., Inc., 258 Va. 264, 267, 518 S.E.2d 635, 637 (1999)*; *Jeld-Wen, Inc. v. Gamble, 256 Va. 144, 148, 501 S.E.2d 393, 396 (1998)*; *Ford Motor Co. v. Bartholomew, 224 Va. 421, 432, 297 S.E.2d 675, 680 (1982)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 963–64, 252 S.E.2d 358, 367 (1979)*; *Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975)*; *General Bronze Corp. v. Kostopulos, 203 Va. 66, 69, 122 S.E.2d 548, 551 (1961)*; *H.M. Gleason & Co. v. International Harvester Co., 197 Va. 255, 260–61, 88 S.E.2d 904, 908 (1955)*; *Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 198, 64 S.E.2d 723, 727 (1951)*.

## PRACTICE COMMENTARY

The instruction is not applicable when a product has been manufactured in accordance with the buyer's plans and specifications unless his plans are so obviously deficient they reasonably should not be followed, *Spangler v. Kranco, Inc., 481 F.2d 373, 375 (4th Cir. 1973)*, or unless there are latent defects known to the manufacturer, *General Bronze Corp., 203 Va. at 69, 122 S.E.2d at 551*.

The duty to use ordinary care to design or manufacture a product that will be reasonably safe for any reasonably foreseeable purpose does not require a manufacturer to supply an accident-proof product. *Besser Co. v. Hansen, 243 Va. 267, 276, 415 S.E.2d 138, 144 (1992)*. While a manufacturer may be held liable for a reasonably foreseeable misuse of a product, common knowledge of a danger from the foreseeable misuse of a product does not alone give rise to a duty to safeguard against the danger of that misuse. *Holiday Motor Corp., 292 Va. at 477, 790 S.E.2d at 455*; *Jeld-Wen, Inc., 256 Va. at 148–49, 501 S.E.2d at 396–97*. See also Instructions Nos. 34.075 and 34.076, Breach of Warranty (Negligence) By Seller or Manufacturer and Definition of Unreasonably Dangerous Product, respectively.

Those who install equipment manufactured by another may be held liable for failure to make reasonable inspection after installation to determine whether the equipment will work as intended. See *H.M. Gleason & Co., 197 Va. at 260–61, 88 S.E.2d at 908*; *Robey, 192 Va. at 198, 64 S.E.2d at 727*.

## *ALERTS:*

None.

## *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.150
## Manufacturer's and Seller's Duty to Warn: General

**When a** [manufacturer; seller] **knows, or by the use of ordinary care has a reason to know, that its product is potentially dangerous, and that this danger is not obvious or readily discoverable by the buyer, and that injury reasonably could be anticipated, the** [manufacturer; seller] **has a duty to give an adequate warning of this danger.**

**In determining whether the warning given was adequate under the circumstances, you may consider:**

**(1) whether it could be expected to catch the attention of a reasonable person;**

**(2) whether it could be understood by a reasonable person; and**

**(3) whether it gave a reasonable indication of the nature and extent of the potential danger.**

**If the** [manufacturer; seller] **had a duty to give a warning, and if it failed to give an adequate warning, then it was negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Evans v. NACCO Materials Handling Grp., Inc., 295 Va. 235, 252–55, 810 S.E.2d 462, 472–73 (2018)*; *Funkhouser v. Ford Motor Co., 285 Va. 272, 280–81, 736 S.E.2d 309, 313 (2013)*; *Jones v. Ford Motor Co., 263 Va. 237, 253, 559 S.E.2d 592, 600 (2002)*; *Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 134–35, 413 S.E.2d 630, 634 (1992)*; *Pfizer, Inc. v. Jones, 221 Va. 681, 684, 272 S.E.2d 43, 44–45 (1980)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 962, 252 S.E.2d 358, 366–67 (1979)*; *McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 852, 75 S.E.2d 712, 718 (1953)*.

### PRACTICE COMMENTARY

The instruction may be used for products which are dangerous because of a defect in design, manufacture, or construction, as well as for inherently dangerous products which are free of defects but are unsafe by their nature. *General Bronze Corp. v. Kostopulos, 203 Va. 66, 70, 122 S.E.2d 548, 551 (1961)*.

☞ ***PRACTICE POINTER:*** The duty to warn extends to consumers who are allergic to the product if the manufacturer knew or had reason to know of that characteristic of the product. See Instruction No. 34.080, Merchantability: Allergic Users.

☞ ***PRACTICE POINTER:*** A repairman, who is not the manufacturer, who competently performs the requested work has no duty to warn of any potential dangers unrelated to his specific undertaking. *Baker v. Poolservice, Co., 272 Va. 677, 686, 636 S.E.2d 360, 365 (2006)*.

### *ALERTS:*

- Where the potentially dangerous product is a prescription drug, the manufacturer must give an adequate warning to the physician so that he may warn the patient of the dangers. See Instruction No. 34.155 regarding the drug manufacturer's duty to warn and Chapter 35, Professional Liability.

- This instruction assumes that a warning was given and that the question for the jury is the adequacy of the warning. If there is an issue as to whether any warning was given, the instruction will need to be redrafted.

- A manufacturer has a duty to warn only if it knows, or has reason to know, that its product is dangerous. "Reason to know" instead of the higher standard "should know" is the appropriate standard for Virginia. *Owens-Corning, 243 Va. at 135, 413 S.E.2d at 634–35*.

- Evidence of similar incidents occurring "under substantially the same circumstances" and "caused by the same or similar defects and dangers as those in issue" may be used to show a manufacturer knew, or had reason to know, a product is dangerous. "This rule springs from the lessons of human experience that similar causes can be expected to produce similar effects." *Funkhouser, 285 Va. at 281, 736 S.E.2d at 313–14* (internal quotations omitted).

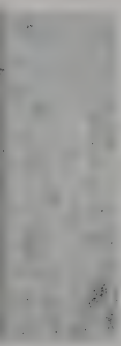
***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14



## Instruction No. 34.155
## Manufacturer's Duty to Warn: Medications

**The manufacturer of a prescription drug or medication has the duty to warn the prescribing physician about the possible dangers to patients who use the drug or medication. This is to enable the physician to give an adequate warning of the dangers to the patient. If, however, a drug manufacturer warns against a particular use of the drug or medication, it need not explain exactly how improper use might affect the patient.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Pfizer, Inc. v. Jones, 221 Va. 681, 684, 272 S.E.2d 43, 44–45 (1980).*

### PRACTICE COMMENTARY

*Pfizer* holds that where a drug manufacturer has warned against a particular use of a medication, it has no duty to warn specifically of the dangers associated with improper use. *Pfizer, 221 Va. at 684, 272 S.E.2d at 45.*

Under the "learned intermediary doctrine," a manufacturer of a drug must warn the treating physician about the risks of a drug. This doctrine is discussed in *Talley v. Danek Medical, Inc., 179 F.3d 154, 162–63 (4th Cir. 1999).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

**Instruction No. 34.160**
**[RESERVED]**

## Instruction No. 34.170
## Seller's Duty: Inspect or Test

**If the seller knows, or by using ordinary care has a reason to know, that a product is likely to be dangerous or defective, he has a duty to make inspections or tests that are reasonably necessary to see that the product is safe for its intended purpose, and for any other reasonably foreseeable use.**

**If a seller fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *H.M. Gleason & Co. v. International Harvester Co., 197 Va. 255, 260–62, 88 S.E.2d 904, 908–09 (1955).*

### PRACTICE COMMENTARY

The instruction is applicable to all suppliers of products except manufacturers, those sellers who hold themselves out to be manufacturers, and those who install equipment manufactured by another.

With respect to manufacturers, federal court decisions have concluded that Virginia does not recognize "failure to test" as a basis for product liability. See *Ball v. Takeda Pharm. Am., Inc., 963 F. Supp. 2d 497, 506 (E.D. Va. 2013)* ("The Virginia Supreme Court has stated that a product may be 'unreasonably dangerous' in three ways, 'if it is defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties.' *Sykes v. Bayer Pharms. Corp., 548 F. Supp. 2d 208, 215 (E.D. Va. 2008)* (quoting *Morgen Indus., Inc. v. Vaughan, 252 Va. 60, 471 S.E.2d 489, 492 (1996)*). By implication, any other type of product-liability claim cannot succeed. *Id.* (dismissing 'failure to test' claim); see also *Torkie-Tork v. Wyeth, 757 F. Supp. 2d 567, 572 (E.D. Va. 2010)* (under Virginia law, drug manufacturer did not have a duty to conduct additional testing of its product beyond what was performed as part of the FDA approval process). No court has yet accepted a 'failure to test' theory as a viable claim separate and apart from the three traditional product defect claims mentioned above. *Id.*"

☞ ***PRACTICE POINTER:*** A repairman, who is not the manufacturer, who competently performs the requested work has no duty to warn of any potential dangers unrelated to his specific undertaking. *Baker v. Poolservice, Co., 272 Va. 677, 686, 636 S.E.2d 360, 365 (2006).*

### ***ALERTS:***

- A manufacturer has a duty to warn only if it knows, or has reason to know, that its product is dangerous. "Reason to Know" instead of the higher standard "should know" is the appropriate standard for Virginia. *Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 134, 413 S.E.2d 630, 634 (1992).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.180
## Negligence *Per Se* (Example for Pesticide)

**A manufacturer of a pesticide has a duty to see that the label does not contain a false or misleading statement about the product or its ingredients.**

**If the manufacturer fails to perform this duty, then it is negligent.**

[A person has a duty to [use; cause to be used] a pesticide in a manner consistent with [its labeling; applicable regulations].]

[If a person fails to perform this duty, then he is negligent.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 3.2-3900–3.2-3947.

**CASE AUTHORITY:** *Kaltman v. All American Pest Control, Inc., 281 Va. 483, 497–98, 706 S.E.2d 864, 873 (2011)*; *McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 854, 75 S.E.2d 712, 719 (1953).*

### PRACTICE COMMENTARY

This negligence *per se* instruction merely exemplifies the form to be used when a particular violation of one of the foregoing statutes is involved. The example is based on Va. Code Ann. § 3.2-3938(1).

The first paragraph of the instruction should be used if a product is improperly labeled. Use the bracketed paragraphs if a product is used in a manner inconsistent with its labeling or in violation of the regulations of the Board of Agriculture and Consumer Services.

In *McClanahan*, the Supreme Court held that the failure to comply with the warning requirements of the pesticide statutes constituted negligence *per se*. *McClanahan, 194 Va. at 852, 75 S.E.2d at 718.* In *Kaltman*, the Supreme Court held that it was negligence *per se* to violate the requirement of Va. Code Ann. § 3.2-3939(B) that a pesticide not be used in a manner inconsistent with the label or regulations. *Kaltman, 281 Va. at 497–98, 706 S.E.2d at 873.*

The label also must not contain any graphic representation or design that is misleading.

The sample instruction is based on Va. Code Ann. § 3.2-3938(1). The statutes related to the use of pesticides are contained in Va. Code Ann. §§ 3.2-3900–3.2-3947. Statutes related to food are contained in Va. Code Ann. §§ 3.2-5100–3.2-5648 Statutes related to drugs and cosmetics are contained in Va. Code Ann. §§ 54.1-3400–54.1-3472.

☞ ***PRACTICE POINTER:*** There are statutes that establish certain affirmative duties as to labeling. See Va. Code Ann. §§ 3.2-3938, 3.2-3939.

### *ALERTS:*

- The Supreme Court has observed that "the violation of a statute does not, by that very fact alone, constitute actionable negligence or make the guilty party negligent per se." *Williamson v. Old Brogue, Inc., 232 Va. 350, 355, 350 S.E.2d 621, 624 (1986).* The reason is that under Virginia law

> the doctrine applies only where there is a common-law cause of action. The doctrine of negligence per se does *not* create a cause of action where one did not exist at common law. Thus, the doctrine does not create a duty of care. It merely sets a standard of care by which the defendant may be judged in the common-law action.

See generally Charles E. Friend, Personal Injury Law in Virginia § 2.3.2(A), at 23 (3d ed. 2003 & Supp. 2017). "In other words, a statute may define the standard of

care to be exercised where there is an underlying common-law duty, but the doctrine of negligence per se does not create a cause of action where none otherwise exists." *Williamson, 232 Va. at 355, 350 S.E.2d at 624.* "The effect of the doctrine of 'negligence per se,' when applicable, is that it establishes the second element of common-law negligence—breach of duty—by reference to a statutory standard rather than the common-law 'ordinary prudent person' standard." Kent Sinclair, Sinclair on Virginia Remedies § 25-4[A], at 25–26 (5th ed. 2016).

A negligence per se claim predicated on a statutory violation

> requires a showing that [i] the tortfeasor had a duty of care to the plaintiff, [ii] the standard of care for that duty was set by statute, [iii] the tortfeasor engaged in acts that violated the standard of care set out in the statute, [iv] the statute was enacted for public health and safety reasons, [v] the plaintiff was a member of the class protected by the statute, [vi] the injury was of the sort intended to be covered by the statute, and [vii] the violation of the statute was a proximate cause of the injury.

*Steward v. Holland Family Props., LLC, 284 Va. 282, 287, 726 S.E.2d 251, 254 (2012).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.190
## Unsafe Use of Product

**If a plaintiff uses a product in a manner which he knows, or by using ordinary care should know, is unsafe, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Besser Co. v. Hansen, 243 Va. 267, 278, 415 S.E.2d 138, 144 (1992)*; *Ford Motor Co. v. Bartholomew, 224 Va. 421, 432, 297 S.E.2d 675, 680–81 (1982)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979)*; *Reed v. Carlyle & Martin, Inc., 214 Va. 592, 594–95, 202 S.E.2d 874, 876–77 (1974)*; *McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 862–64, 75 S.E.2d 712, 724–25 (1953).*

### PRACTICE COMMENTARY

This instruction should be used in negligence cases.

The instruction is applicable to inherently dangerous products as well as to those products which are defective by negligence in design, manufacture or construction. The instruction is also applicable when plaintiff uses a product with an open and obvious defect or danger; with actual knowledge of the defective or dangerous condition; or without such inspection or precautions as may be necessary under the circumstances. *McClanahan, 194 Va. at 862–64, 75 S.E.2d at 724–25*; *Reed, 214 Va. at 594–95, 202 S.E.2d at 876–77*; *Elkins v. United States, 307 F. Supp. 700, 705–06 (1969).*

☞ ***PRACTICE POINTER:*** If the misuse of a product is not causally related to the injury, then this instruction is inappropriate.

### *ALERTS:*

• Contributory negligence is not a defense to an action based on a breach of warranty. *Jones v. Ford Motor Co., 263 Va. 237, 261, 559 S.E.2d 592, 605 (2002)*; *Wood v. Bass Pro Shops, 250 Va. 297, 300–301, 462 S.E.2d 101, 103 (1995).* It has been stated as a general proposition that contributory negligence is not a defense in failure to warn cases since plaintiff is not responsible for injuries he suffered when there was no reason to suspect the possibility of injury until it was too late. *Briggs v. Zotos Int'l, Inc., 357 F. Supp. 89, 91 (E.D. Va. 1973).* Nevertheless, even in the absence of warning, the plaintiff is required to use ordinary care in the use of a product, and recovery may be barred by his failure to do so. Some cases treat this failure as contributory negligence where the facts are such that plaintiff should have known injury might result. *Elkins, 307 F. Supp. at 705–06.* Other cases deal with plaintiff's conduct as an intervening cause of the injury, i.e., lack of proximate cause bars recovery. *Briggs, 357 F. Supp. at 90–91.*

• Failure to follow directions for use is not sufficient to bar recovery if the plaintiff has followed commonly recognized safe practices, i.e., exercised ordinary care. *McClanahan, 194 Va. at 863, 75 S.E.2d at 724*; see also *Reed, 214 Va. at 595, 202 S.E.2d at 877.* It may, however, be evidence of misuse as when plaintiff acts in defiance of defendant's warnings, and recovery may be barred. See Instruction No. 34.200, Misuse or Unintended Use of Product. Continued use of a malfunctioning product having a latent defect may not be a defense during the period that the defect merely restricts the utility of the product if continued use is foreseeable.

*White Consol. Indus., Inc. v. Swiney, 237 Va. 23, 29 376 S.E.2d 283, 286 (1989).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.200
## Misuse or Unintended Use of Product

**The plaintiff cannot recover if he misused the product in a way not reasonably foreseeable by the manufacturer.**

[A buyer has a duty to use the product as it is intended to be used or in a way reasonably foreseeable by the manufacturer.

If a buyer fails to perform this duty, then he is negligent.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Jeld-Wen, Inc. v. Gamble, 256 Va. 144, 148–50, 501 S.E.2d 393, 396–97 (1998)*; *Besser Co. v. Hansen, 243 Va. 267, 277–78, 415 S.E.2d 138, 144 (1992)*; *Ford Motor Co. v. Bartholomew, 224 Va. 421, 432, 297 S.E.2d 675, 680–81 (1982)*; *Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979)*; *Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 252, 217 S.E.2d 863, 869 (1975)*.

### PRACTICE COMMENTARY

The instruction contains alternative expressions of the same rule. You should select whichever version seems more applicable based on the circumstances.

It is not clear under Virginia law whether misuse or unintended use is an affirmative defense that must be pled by the defendant or, instead, if misuse or unintended use is better conceived as the defendant's challenge to the plaintiff's burden of establishing defect and causation, and thus misuse or unintended use would constitute a "defense" only in the loose sense of the term.

☞ ***PRACTICE POINTER:*** When the cause of action is brought in breach of implied warranty, Instruction No. 34.100, Misuse or Unintended Use, should be used.

### *ALERTS:*

- The Supreme Court of Virginia has not expressly resolved whether misuse is an affirmative defense that must be pled. While there is case law suggesting that the plaintiff has the burden of proving that the product was used as intended or that the manner of use was foreseeable, this has not been definitively resolved. See, e.g., *Jeld-Wen, Inc., 256 Va. at 147–48, 501 S.E.2d at 396.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.300
## Motor Vehicle Warranty Enforcement Act: Manufacturer's and Dealer's Duty to Conform to Warranty

**The manufacturer of a motor vehicle, and its agent or authorized dealer, has a duty to conform the vehicle to any applicable warranty by repairing or correcting any defect or condition, including those that do not affect the drivability of the vehicle, which significantly impairs the use, market value or safety of the vehicle to the consumer.**

**If, after a reasonable number of attempts during the period ending eighteen (18) months after the date of original delivery to the consumer of the vehicle, the manufacturer, or its agent or authorized dealer, has not conformed the vehicle to the applicable warranty, then the manufacturer has a duty either:**

**(1) to replace the motor vehicle with a comparable motor vehicle acceptable to the consumer; or**

**(2) to accept return of the motor vehicle and refund to the consumer** [and any lienholder as their interests may appear] **the full purchase price, including all collateral charges, and incidental damages, less a reasonable allowance for the consumer's use of the vehicle up to the date of first notice of nonconformity given to the manufacturer, its agents or authorized dealer.**

**The consumer shall have the unconditional right to choose a refund rather than a replacement vehicle and to drive the vehicle until he receives either the replacement vehicle or the refund. Mileage, expenses, and reasonable loss of use necessitated by attempts to conform the vehicle to the express warranty may be recovered by the consumer.**

**The manufacturer, its agent or dealer shall be allowed the subtraction of a reasonable allowance for use by the consumer whether the consumer chooses a replacement vehicle or a refund.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 59.1-207.11, 59.1-207.12, 59.1-207.13(A).

**CASE AUTHORITY:** *Chase v. DaimlerChrysler Corp., 266 Va. 544, 548–49, 587 S.E.2d 521, 523 (2003)*; *Subaru of America, Inc. v. Peters, 256 Va. 43, 49–52, 500 S.E.2d 803, 806–07 (1998).*

### PRACTICE COMMENTARY

The instruction incorporates the definition of "lemon law rights period" from Va. Code Ann. § 59.1.207.11. See Va. Code Ann. § 59.1-207.11 for the definitions of "manufacturer," "motor vehicle," "significant impairment," "consumer," "comparable motor vehicle," "lienholder," "collateral charges," and "reasonable allowance of use."

A consumer who qualifies for relief under the Act includes a person who purchased the vehicle from an owner who used the vehicle for business purposes, so long as the vehicle is within the warranty period. *Subaru of America, Inc., 256 Va. at 49–50, 500 S.E.2d at 805–06.*

The plaintiff can only recover attorney's fees if he is successful in the litigation. A dismissal of the action in favor of the defendant after the parties reached a settlement does not qualify for a recovery of attorney's fees. *Chase, 266 Va. at 548–49, 587 S.E.2d at 523.*

☞ ***PRACTICE POINTER:*** See Va. Code Ann. § 8.2-715 for the meaning of "incidental damages."

☞ ***PRACTICE POINTER:*** The definition of "warranty" is in Instruction No. 34.320.

### ***ALERTS:***

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.310
## Motor Vehicle Warranty Enforcement Act: Presumption of Significant Impairment

**It shall be presumed that a reasonable number of attempts have been undertaken to conform a vehicle to the warranty and that the vehicle is significantly impaired if, during the period of eighteen (18) months following the date of original delivery of the vehicle to the consumer, either:**

**(1) The same nonconformity has been subject to repair three (3) or more times by the manufacturer, its agent, or its authorized dealer, and the same nonconformity continues to exist; or**

**(2) The nonconformity is a serious safety defect and has been subject to repair one (1) or more times by the manufacturer, its agent, or its authorized dealer, and the same non-conformity continues to exist; or**

**(3) The vehicle is out of service due to repair for a cumulative total of thirty (30) calendar days.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 59.1-207.11, 59.1-207.13(B).

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The instruction incorporates the definition of "lemon law rights period" from Va. Code Ann. § 59.1-207.11. See Va. Code Ann. § 59.1-207.11 for the definitions of "motor vehicle," "significant impairment," "consumer," "nonconformity," and "serious safety defect." The definition of "warranty" is in Instruction No. 34.320, Motor Vehicle Warranty Enforcement Act: Definition of Warranty.

### *ALERTS:*

- There is an exception to the thirty (30) calendar days requirement where the repairs could not be performed because of conditions beyond the control of the manufacturer, its agents, or its authorized dealers, including war, invasion, strike, fire, flood, or other natural disasters. Va. Code Ann. § 59.1-207.13 (B). The exception should be added to subparagraph (3) of this instruction if appropriate under the facts of the case.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

## Instruction No. 34.320
## Motor Vehicle Warranty Enforcement Act: Definition of Warranty

**Warranty means any implied warranty or any written warranty of the manufacturer. Warranty also means any affirmations of fact or promise made by the manufacturer in connection with the** [sale; lease] **of a vehicle that become part of the basis of the bargain. The term "warranty" deals with the obligations of the manufacturer in relation to materials, workmanship, and fitness of a vehicle for ordinary use or reasonable intended purposes. The warranty lasts for (18) months after the new vehicle was originally delivered to the consumer.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 59.1-207.11.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The instruction incorporates the definition of "lemon law rights period" from Va. Code Ann. § 59.1-207.11. See Va. Code Ann. § 59.1-207.11 for the definitions of "manufacturer" and "motor vehicle."

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 8.4, 19.1 through 19.4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 29

Kent Sinclair, VIRGINIA REMEDIES §§ 28-1 through 28-8, 74-5

MICHIE'S JURISPRUDENCE, Commercial Law § 15, Drugs and Druggists § 3; Negligence § 14

# Chapter 35

# PROFESSIONAL LIABILITY


**Scope Note**

**Instruction No. 35.000** Statewide Standard of Care for Health Care Providers

**Instruction No. 35.010** Statewide or Local Standard of Care for Health Care Providers

**Instruction No. 35.020** Duration of Duty

**Instruction No. 35.030** Duration of Duty: Termination of Services by Consent

**Instruction No. 35.040** Unsuccessful Outcome Is Not Proof of Negligence

**Instruction No. 35.050** Proof of Standard of Care: Expert Testimony

**Instruction No. 35.060** Opinion of Medical Malpractice Review Panel

**Instruction No. 35.070** Treatment Without Consent

**Instruction No. 35.080** Treatment Without Informed Consent

**Instruction No. 35.090** Lack of Consent: Emergencies

**Instruction No. 35.100** Surgeon's Responsibility in Operating Room

**Instruction No. 35.110** Patient's Duty to Mitigate Damages

**Instruction No. 35.120** Good Samaritans

**Instruction No. 35.130** Duty of Hospitals

**Instruction No. 35.200** Duty of Architects

**Instruction No. 35.300** Implied Warranty—Construction Contract

# SCOPE NOTE

This chapter covers the liability of health care providers, architects, and building contractors. Attorney malpractice is covered in Chapter 42, Attorney and Client.

***Health Care Providers.*** These instructions cover actions for malpractice brought against physicians, hospitals, nursing homes, and others who provide health care. Except where noted in a memorandum, these instructions are applicable to any "health care provider." To adapt these instructions to other health care providers, it is usually only necessary to substitute the type of health care provider for "doctor" in the instruction.

Va. Code Ann. § 8.01-581.1 *et seq.* (the "Medical Malpractice Act") governs medical malpractice litigation and is applicable to any action brought for "malpractice" against a "health care provider," as those terms are defined in Va. Code Ann. § 8.01-581.1. However, a clinical laboratory which provides inaccurate test results to a physician is not a "health care provider" under the Medical Malpractice Act because it is not "licensed." *Richman v. National Health Labs., Inc., 235 Va. 353, 357, 367 S.E.2d 508, 510–11 (1988).* But see *Khadim v. Laboratory Corp. of Am., 838 F. Supp. 2d 448, 469 n.16 (W.D. Va. 2011)* (holding that the 2001 amendments to Va. Code Ann. § 8.01-581.1 abrogated *Richman*). A licensed home for adults is not a "health care provider" under Va. Code Ann. § 8.01-581.1. *Commercial Distribs., Inc. v. Blankenship, 240 Va. 382, 393, 397 S.E.2d 840, 846 (1990).*

The Act allows any party to demand a review of the case's merits by a medical review panel prior to trial. Va. Code Ann. § 8.01-581.2(A). There are specific provisions that control the hearing before the panel. Va. Code Ann. §§ 8.01-581.2–8.01-581.6; Medical Malpractice Rules of Practice of The Supreme Court of Virginia. The panel is required to render an opinion after it has received all the evidence, Va. Code Ann. § 8.01-581.7, and that opinion is admissible, but not conclusive, at trial. Va. Code Ann. § 8.01-581.8; Instruction No. 35.060.

The Act also creates immunity for various activities and certain health care providers, and limits malpractice recovery. Va. Code Ann. §§ 8.01-581.13, 8.01-581.15–8.01-581.19. The medical malpractice cap in Va. Code Ann. § 8.01-581.15 has been upheld as constitutional. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 257 Va. 1, 21, 509 S.E.2d 307, 318 (1999)*; *Etheridge v. Medical Ctr. Hosps., 237 Va. 87, 94–104, 376 S.E.2d 525, 528–34 (1989).* However, where the patient and doctor enter into a contract, either oral or written, the patient may allege breach of contract and avoid the application of the Medical Malpractice Act as to that cause of action. *Glisson v. Loxley, 235 Va. 62, 65–68, 366 S.E.2d 68, 69–71 (1988)* (superseded by statute in part on other grounds).

Va. Code Ann. § 8.01-581.20 specifies the standard of care for a health care provider, including a hospital or a nursing home. The standard is the degree of skill and diligence of a reasonably prudent practitioner in the same field of practice or specialty in the entire state unless a preponderance of the evidence demonstrates to the jury that a local standard is more appropriate. Va. Code Ann. § 8.01-581.20. The statute is specific on this point: it is up to the jury to determine whether to use a statewide or a local standard if there is a dispute. *Black v. Bladergroen* expressly rejected a national standard of care. *258 Va. 438, 443, 521 S.E.2d 168, 170 (1999).*

A request for service of process in a medical malpractice action constitutes a certification that the plaintiff has obtained a signed written opinion from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness stating that the defendant deviated from the applicable standard of care and the deviation was a proximate cause of the plaintiff's injuries. Va. Code Ann. § 8.01-20.1. The Court may review the opinion in camera with good cause. *Id.*

Any party may offer expert testimony to explain the applicable standard of care if the expert meets the qualification requirements in Va. Code Ann. § 8.01-581.20(A). *Jackson v. Qureshi, 277 Va. 114, 121–22, 671 S.E.2d 163, 167 (2009)*; *Perdieu v. Blackstone Family Practice Ctr., Inc., 264 Va. 408, 419, 568 S.E.2d 703, 709 (2002)*; *Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va. 531, 537, 457 S.E.2d 66, 70 (1995)*. An expert is presumed qualified to testify if he or she is licensed in Virginia, or has met the Virginia educational and examination requirements, and he or she knows the standard of care applicable to the case and what is considered in conformity with that standard. Va. Code Ann. § 8.01-581.20(A). However, where the facts giving rise to the malpractice are within the common knowledge and experience of the triers of fact, expert testimony regarding the applicable standard of care may not be required.

Va. Code Ann. § 8.01-581.20(C) limits each party to two expert witnesses per medical discipline on any issue presented unless the Court for good cause allows a party to offer additional expert testimony. This subsection does not apply to treating health care providers who may serve as expert witnesses pursuant to Va. Code Ann. § 8.01-399, except for good cause shown.

There are two standard-of-care instructions. The first, Instruction No. 35.000, is for cases where neither party disputes the applicability of the statewide standard of care. The second, Instruction No. 35.010, is for cases where there is a dispute and where one party has put on sufficient proof that a local standard may apply, and the jury is required to determine the applicable standard. Theoretically, either side might argue for the local standard; practically, only defendants will, and that is how the model is drafted.

A malpractice action is a negligence action. The plaintiff must prove negligence, proximate cause, and damages. In addition to either Instruction No. 35.000 or No. 35.010, a proximate cause instruction is necessary. Usually Instruction No. 5.000, Definition of Proximate Cause, in Chapter 5, Causation, will apply. Instruction No. 5.000 was approved in *Blondel v. Hays, 241 Va. 467, 474, 403 S.E.2d 340, 344 (1991)*. Neither the causation nor the issues instruction should employ "substantial possibility of survival" language. *Id. at 474, 403 S.E.2d at 344*; see also *Wagoner v. Commonwealth, 289 Va. 476, 485–86, 770 S.E.2d 479, 484–85 (2015)* (Virginia expressly "prohibit[s] jury instructions addressing the loss of a substantial possibility of survival" in medical malpractice cases, although such loss may be evidence of proximate cause).

Because expert testimony is usually required to establish what a reasonably prudent doctor would have done and, often, that the defendant doctor did not meet the standard, medical malpractice actions differ from most other negligence actions. *Perdieu, 264 Va. at 419–20, 568 S.E.2d at 709–10 (2002)*. Instruction No. 35.050 covers such a situation, regardless of whether a statewide or local standard applies. Where expert testimony is not required because "the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience," this instruction is not necessary. *Gregory v. Hawkins, 251 Va. 471, 475, 468 S.E.2d 891, 893 (1996)* (attorney malpractice); see also *Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 267–68, 441 S.E.2d 1, 3 (1994)*

(nursing home); *Easterling v. Walton, 208 Va. 214, 218–19, 156 S.E.2d 787, 791 (1967)* (physician malpractice). Further, "pure" expert testimony may not be required to prove causation where lay testimony, medical facts, and medical opinion is presented. Compare *Webb v. Smith, 276 Va. 305, 308, 661 S.E.2d 457, 459 (2008)*, and *Nichols v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc., 257 Va. 491, 499–500, 514 S.E.2d 608, 612–13 (1999)*, *with Summers v. Syptak, 293 Va. 606, 615, 801 S.E.2d 422, 426 (2017)*.

Health care providers may commit malpractice if they act without consent. The action is analogous to a battery action. Instruction No. 35.070. Virginia law recognizes that a physician may be liable for a "technical battery" where:

> (1) the patient placed terms or conditions on [the] consent for a particular procedure, and the doctor ignored those terms or conditions; (2) the physician intentionally performed an additional procedure beyond the procedure the patient consented to; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent.

*Mayr v. Osborne, 293 Va. 74, 80, 795 S.E.2d 731, 735 (2017)*. The distinction between a technical battery and an action in negligence generally hinges on the question of consent and will depend upon the facts of each case. *Id. at 81–83, 795 S.E.2d at 735–37*.

A different situation exists if the doctor provided treatment to which his patient had consented, but to which his patient's consent was not *informed* consent. This is a negligence action: the negligence lies in the doctor's failure to give his patient enough information to make an informed choice. The treatment must cause some injury to the plaintiff, and the injury must have been proximately caused by the inadequacy of the information he received. The plaintiff must prove that he would not have consented to the treatment if the doctor had adequately advised him of its dangers. The negligence and proximate cause inquiries are centered on the doctor's allegedly inadequate description of the risks and the patient's resulting uninformed consent. Thus, the doctor may be liable even though he performed skillfully if the patient experienced one of the recognized, but unavoidable, potential risks, and if the jury believes that he would not have undergone treatment if he had known of the risk. Informed consent is covered by Instruction No. 35.080.

A doctor does not need consent or informed consent to operate in an emergency. Instruction No. 35.090.

The chief surgeon is a principal who is responsible for the negligence of his agents because he controls them, often called the "captain of the ship" doctrine. *Easterling, 208 Va. at 216, 156 S.E.2d 789*. Because those agents may be other doctors or nurses employed by a hospital, a specific instruction for malpractice cases, Instruction No. 35.100, is offered instead of the general agency instruction. Sometimes there will be a factual dispute as to whether someone is under the chief surgeon's control. For example, an anesthesiologist may not be under the surgeon's control at all, or the anesthesiologist may be under the surgeon's control only in certain circumstances. When there is a dispute, an instruction more specific than Instruction No. 35.100 that focuses the jury's attention on that issue may be appropriate. You should consult Chapter 8, Agency, Employment and Similar Relationships for further guidance.

Contributory negligence may be an issue in a medical malpractice case if the contributory negligence is "contemporaneous" with the main alleged negligent act. *Chandler v. Graffeo, 268 Va. 673, 681, 604 S.E.2d 1, 5 (2004)*; *Gravitt v. Ward, 258 Va. 330, 335, 518 S.E.2d 631, 634 (1999).* If the defendant alleges contributory negligence, refer to Chapter 6.

Mitigation of damages is an issue where the plaintiff has failed to minimize loss through the exercise of ordinary care. Instruction No. 35.110. See, e.g., *Lawrence v. Wirth, 226 Va. 408, 412, 309 S.E.2d 315, 317 (1983).*

Virginia has a Good Samaritan statute that applies to all individuals, including health care providers, supplying emergency care or assistance. Va. Code Ann. § 8.01-225; Instruction No. 35.120.

In addition to the statute-based standard of care for hospitals, Instruction Nos. 35.000 and 35.010, a common law standard may apply to hospitals as well. Instruction No. 35.130. It is not clear that the statutory provisions were intended to alter a hospital's common law liability. Even if they were, Instruction No. 35.130 is an accurate statement of the duty of hospitals. If the fact that the injury occurred in a hospital is incidental—a slip and fall on a floor, an elevator accident, a loose banister—then there is no lack of common law on standards. If the injury is related to patient care—inadequacy of restraints, improper or malfunctioning equipment, or inadequate nursing supervisions—then the wiser course is to provide a professional opinion on the deviation from reasonable care.

***Architects.*** Instruction No. 35.200 deals with the duty of an architect and liability for negligence.

***Building Contractors.*** Instruction No. 35.300 instructs that construction contracts include an implied warranty governing a builder's performance.

## Instruction No. 35.000
## Statewide Standard of Care for Health Care Providers

**A doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in this State would have used under the circumstances of this case. This is referred to as the standard of care.**

**If a doctor fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-581.20.

**CASE AUTHORITY:** *Holt v. Chalmeta, 295 Va. 22, 32–34, 809 S.E.2d 636, 641–42 (2018)*; *Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 535–37, 636 S.E.2d 416, 425–26 (2006)*; *Black v. Bladergroen, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999)*; *Griffett v. Ryan, 247 Va. 465, 471–72, 443 S.E.2d 149, 153 (1994)*; *Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 268–69, 441 S.E.2d 1, 3–4 (1994)*; *Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986)*; *Brown v. Koulizakis, 229 Va. 524, 532, 331 S.E.2d 440, 445–46 (1985)*; *Whitfield v. Whittaker Mem'l Hosp., 210 Va. 176, 183, 169 S.E.2d 563, 568 (1969)*; *United Dentists, Inc. v. Bryan, 158 Va. 880, 884–85, 164 S.E. 554, 555 (1932)*.

### PRACTICE COMMENTARY

Va. Code Ann. § 8.01-581.1 defines the "health care provider[s]" to whom Va. Code Ann. § 8.01-581.20 applies.

The appropriate term or the name of the applicable medical specialty may be substituted for "doctor" in the instruction. For example, an instruction may read: "An orthopedic surgeon has a duty to use the same degree of skill and diligence . . . that a reasonably prudent orthopedic surgeon in Virginia would have used. . . ." A plaintiff is not required to present expert testimony to establish the applicable standard of care in all cases. *Beverly Enters.-Va., Inc., 247 Va. at 267–268, 441 S.E.2d at 3.*

Va. Code Ann. § 8.01-225 exempts doctors and other persons from liability under certain circumstances, including when rendering emergency care or assistance without compensation at the scene of any emergency or en route therefrom. See Instruction No. 35.120, Good Samaritans. Also, a school team physician is immune from liability for emergency care when acting without compensation, and in the absence of gross negligence or willful misconduct. Va. Code Ann. § 8.01-225.1.

☞ ***PRACTICE POINTER:*** In a case involving multiple defendants with different specialties, this instruction may have to be repeated for each specialty or each defendant as clarity demands.

☞ ***PRACTICE POINTER:*** A statewide standard of care applies unless either party proves by a preponderance of the evidence that a local standard is more appropriate. *Rhoades v. Painter, 234 Va. 20, 23, 360 S.E.2d 174, 175 (1987).* If there is evidence that a local standard should be applied, see Instruction No. 35.010, Statewide or Local Standard of Care.

### ***ALERTS:***

- If this instruction is given, Instruction No. 35.010, Statewide or Local Standard of Care, should not be given. This instruction is used where there is no dispute that a statewide standard applies. Any doctor or health care provider with knowledge of the Virginia standards, with subject-matter competency, and with an

active clinical practice in the particular specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action, may testify concerning what a reasonably prudent practitioner of his field should have done under the circumstances. *Jackson v. Qureshi, 277 Va. 114, 121–23, 671 S.E.2d 163, 167–68 (2009).* An expert may give expert testimony on a procedure in his clinical practice that is common to another specialty where the standard of care for the procedure is the same. *Sami v. Varn, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000).* The expert must have maintained an "active clinical practice" in the defendant's specialty or a related field of medicine within one year of the alleged negligent act or omission and the expert must have, at some point, performed the procedure during which the alleged negligent act or omission occurred; however, the expert need not have conducted the same procedure within that same year. *Holt, 295 Va. at 35–38, 809 S.E.2d at 642–44.* The testimony of a proffered expert who has failed to maintain an active clinical practice in the defendant's specialty or a related field within one year of the alleged medical malpractice under Va. Code Ann. § 8.01-581.20 may be excluded. *Jackson, 277 Va. at 121–22, 671 S.E.2d at 167*; *Hinkley v. Koehler, 269 Va. 82, 88–90, 606 S.E.2d 803, 806–07 (2005)*; *Perdieu v. Blackstone Family Practice Ctr., Inc., 264 Va. 408, 419–20, 568 S.E.2d 703, 709–10 (2002)*; *Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va. 531, 536–37, 457 S.E.2d 66, 70 (1995).*

- This instruction says "same field of practice or specialty." Although "same" is not taken from the express language of Va. Code Ann. § 8.01-581.20, it clearly is implied by the other language of the statute. But see *Ives v. Redford, 219 Va. 838, 842–43, 252 S.E.2d 315, 318 (1979)*; *Maxwell v. McCaffrey, 219 Va. 909, 912–13, 252 S.E.2d 342, 345 (1979).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.010
## Statewide or Local Standard of Care for Health Care Providers

**A doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in this State would have used under the circumstances of this case. This is referred to as the standard of care.**

[However, if you find that the [doctor; patient] has proved by the greater weight of the evidence that the health care services, health care facilities, and customary practices in the locality where the treatment took place make a local standard of care more appropriate than a statewide standard, then the local standard applies and a doctor has a duty to use the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in [the same; a similar] locality would have used under the circumstances of this case.]

**If a doctor fails to perform this duty** [under the standard of care you find applicable]**, then he is negligent.**

## SOURCES & AUTHORITY

***GOVERNING STATUTES:*** Va. Code Ann. § 8.01-581.20.

***CASE AUTHORITY:*** *Holt v. Chalmeta, 295 Va. 22, 32–34, 809 S.E.2d 636, 641–42 (2018)*; *Black v. Bladergroen, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999)*; *Griffett v. Ryan, 247 Va. 465, 471–72, 443 S.E.2d 149, 153 (1994)*; *Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986)*; *Noll v. Rahal, 219 Va. 795, 800–01, 250 S.E.2d 741, 745–46 (1979)*; *Whitfield v. Whittaker Mem'l Hosp., 210 Va. 176, 183–84, 169 S.E.2d 563, 568 (1969).*

## PRACTICE COMMENTARY

Va. Code Ann. § 8.01-581.1 defines the "health care provider[s]" to whom Va. Code Ann. § 8.01-581.20 applies.

The appropriate term or the name of the applicable medical specialty may be substituted for "doctor" in the instruction. For example, "An orthopedic surgeon has a duty to use the same degree of skill and diligence . . . that a reasonably prudent orthopedic surgeon in Virginia would have used. . . ."

Va. Code Ann. § 8.01-225 exempts doctors and other persons from liability under certain circumstances, including rendering emergency care or assistance without compensation at the scene of any emergency or en route therefrom. See Instruction No. 35-120, Good Samaritans. Also, a school-team physician is immune from liability for emergency care when acting without compensation, and in the absence of gross negligence or willful misconduct. Va. Code Ann. § 8.01-225.1.

☞ ***PRACTICE POINTER:*** In a case involving multiple defendants with different specialties, this instruction may have to be repeated for each specialty or each defendant as clarity demands.

## ***ALERTS:***

- If this instruction is given, Instruction No. 35.000, Statewide Standard of Care, should not be given.

- A statewide standard of care applies unless there is evidence that a local standard is more appropriate. *Rhoades v. Painter, 234 Va. 20, 23, 360 S.E.2d 174, 175 (1987).* It is the jury that determines the appropriate standard and decides whether the doctor was negligent. An expert may give expert testimony on a procedure in his clinical practice that is common to another specialty where the standard of care for the procedure is the same. *Sami v. Varn, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000).* The testimony of a proffered expert who has failed to maintain an active clinical practice in the defendant's specialty or a related field within one year of the alleged medical malpractice under Va. Code Ann. § 8.01-581.20 may be excluded. *Jackson v. Qureshi, 277 Va. 114, 121–22, 671 S.E.2d 163, 167 (2009)*; *Hinkley v. Koehler, 269 Va. 82, 88–90, 606 S.E.2d 803, 806–07 (2005)*; *Perdieu v. Blackstone Family Practice Ctr., Inc., 264 Va. 408, 419–20, 568 S.E.2d 703, 709–10 (2002)*; *Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va.*

*531, 536–37, 457 S.E.2d 66, 70 (1995).*

• This instruction says "same field of practice or specialty." Although "same" is not taken from the express language of Va. Code Ann. § 8.01-581.20, it clearly is implied by the other language of the statute. But see *Ives v. Redford, 219 Va. 838, 842–43, 252 S.E.2d 315, 318 (1979)*; *Maxwell v. McCaffrey, 219 Va. 909, 912–13 252 S.E.2d 342, 345 (1979).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

**Instruction No. 35.020**
**Duration of Duty**

**A doctor who has accepted a patient for treatment has a duty to continue his services as long as they are necessary. A doctor may not abandon his patient while his services are necessary unless** [he gives notice to the patient and makes arrangements for continuing treatment by another doctor; the patient is afforded a reasonable opportunity to acquire the services needed from another doctor]**.**

**If a doctor fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Rosen v. Greifenberger, 257 Va. 373, 380, 513 S.E.2d 861, 865 (1999); Lyons v. Grether, 218 Va. 630, 634, 239 S.E.2d 103, 106 (1977); Vann v. Harden, 187 Va. 555, 565–66, 47 S.E.2d 314, 319 (1948).*

### PRACTICE COMMENTARY

This instruction should be given with a proximate cause instruction, such as Instruction No. 5.000, Definition of Proximate Cause.

☞ ***PRACTICE POINTER:*** If there is a dispute about whether medical services were still needed, expert testimony may be necessary. If so, Instruction Nos. 35.000, Statewide Standard of Care, and 35.040, Unsuccessful Outcome Is Not Proof of Negligence, may be appropriate.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.030
## Duration of Duty: Termination of Services by Consent

**A doctor who has accepted a patient for treatment may end his services with the consent or at the request of the patient.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lyons v. Grether, 218 Va. 630, 634, 239 S.E.2d 103, 106 (1977); Vann v. Harden, 187 Va. 555, 565–66, 47 S.E.2d 314, 319 (1948).*

### PRACTICE COMMENTARY

This instruction is for use in those cases where the doctor offers the explanation that he terminated his services with his patient's consent. Normally, it will be used only in conjunction with Instruction No. 35.020, Duration of Duty.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.040
## Unsuccessful Outcome Is Not Proof of Negligence

**The fact that a doctor's efforts on behalf of his patient were unsuccessful does not, by itself, establish negligence.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Dixon v. Sublett, 295 Va. 60, 67, 809 S.E.2d 617, 620 (2018)*; *Brown v. Koulizakis, 229 Va. 524, 532, 331 S.E.2d 440, 445 (1985)*; *Easterling v. Walton, 208 Va. 214, 218, 156 S.E.2d 787, 790 (1967)*; *Vann v. Harden, 187 Va. 555, 564, 47 S.E.2d 314, 319 (1948)*; *Reed v. Church, 175 Va. 284, 292–93, 8 S.E.2d 285, 288 (1940)*; *Ropp v. Stevens, 155 Va. 304, 308, 154 S.E. 553, 554 (1930)*; *Hunter v. Burroughs, 123 Va. 113, 135, 96 S.E. 360, 367 (1918).*

### Practice Commentary

This instruction is a specific variation for a malpractice case of the mere-happening-of-an-accident-is-not-negligence instruction or the defendant-is-not-an-insurer instruction. See Instruction Nos. 4.015, Fact of Accident Is Not Proof of Negligence, and 22.000, Duty of Care Owed to Passengers Generally. Both suffer from the same flaw: they repeat in somewhat more argumentative terms the fact that negligence is something that the plaintiff must prove. Nevertheless, both have a long history of acceptance. The Supreme Court of Virginia has not approved this instruction, but has recognized that a physician is not "an insurer of diagnosis and treatment," and "[t]he mere fact that he has failed to effect a cure or that the diagnosis and treatment have been detrimental to the patient's health does not raise a presumption of negligence." *Dixon v. Sublett, 295 Va. 60, 67, 809 S.E.2d 617, 620 (2018).*

### *ALERTS:*

- This instruction is not appropriate in those relatively rare cases where the plaintiff sues the doctor in contract.
- This instruction should not be given when the facts and expert testimony do not support it, such as when expert testimony establishes that an injury does not occur in the absence of negligence or when a procedure was not indicated in the first place.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia, Chapter 20

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 26.04

Kent Sinclair, Virginia Remedies, Chapter 32; § 25-3

Michie's Jurisprudence, Physicians and Surgeons §§ 12 through 21

**Instruction No. 35.050**
**Proof of Standard of Care: Expert Testimony**

**You must determine the standard of care that was required of the defendant by considering only the expert testimony on that subject.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.01-581.20.

**Case Authority:** *Tahboub v. Thiagarajah, 298 Va. 366, 374-78, 837 S.E.2d 752, 756–57 (2020)*; *Holt v. Chalmeta, 295 Va. 22, 33–34, 809 S.E.2d 636, 641–42 (2018)*; *Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 536, 636 S.E.2d 416, 426 (2006)*; *Wright v. Kaye, 267 Va. 510, 520–22, 593 S.E.2d 307, 312–13 (2004)*; *Nichols v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc., 257 Va. 491, 498–500, 514 S.E.2d 608, 612–13 (1999)*; *Griffett v. Ryan, 247 Va. 465, 471–72, 443 S.E.2d 149, 153 (1994)*; *Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994)*; *Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986)*; *Little v. Cross, 217 Va. 71, 75, 225 S.E.2d 387, 390 (1976)*.

## Practice Commentary

This instruction would not be used in a case where the doctrine of *res ipsa loquitur* is applicable, but *res ipsa loquitur* has been narrowly applied in malpractice cases. *Alexander v. Hill, 174 Va. 248, 252, 6 S.E.2d 661, 663 (1940)*; *United Dentists, Inc. v. Bryan, 158 Va. 880, 884, 164 S.E. 554, 555 (1932)*; *Henley v. Mason, 154 Va. 381, 384, 153 S.E. 653, 653 (1930)*.

One set of circumstances where *res ipsa loquitur* has been held to be applicable is when a foreign object is left in the body during an operation. *Easterling v. Walton, 208 Va. 214, 219, 156 S.E.2d 787, 791 (1967)*. See Instruction No. 7.050, Res Ipsa Loquitur; cf. *Dickerson v. Fatehi, 253 Va. 324, 327–28, 484 S.E.2d 880, 882 (1997)* (holding in a foreign object case that summary judgment was premature before it could be determined whether *res ipsa loquitur* was applicable). Other facts warranting a *res ipsa loquitur* instruction include a newborn who was burned while in the exclusive care of hospital staff. *Danville Cmty. Hosp., Inc. v. Thompson, 186 Va. 746, 760–62, 43 S.E.2d 882, 888–89 (1947)*.

Qualifications for experts are set out in Va. Code Ann. § 8.01-581.20. Any person who is licensed to practice in Virginia, and any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia, shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. Va. Code Ann. § 8.01-581.20. Once the presumption is established, the burden shifts to the other party to overcome the presumption. *Black v. Bladergroen, 258 Va. 438, 445, 521 S.E.2d 168, 171 (1999)*. A witness is qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and he has had an active clinical practice in either the defendant's specialty or a related field of medicine within one year of the alleged act or omission forming the basis of the action. Va. Code Ann. § 8.01-581.20. The statute addresses only the qualifications of experts to testify on the standard of care and whether the standard of care is breached, and not whether an expert witness is qualified to testify on proximate causation. *Lloyd v. Kime, 275 Va. 98, 112, 654 S.E.2d 563, 571 (2008)*. An expert may give expert testimony on a procedure in his clinical practice that is common to another specialty where the

standard of care for the procedure is the same in both specialties. *Sami v. Varn, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000).* An expert witness qualified to testify as to the standard of care may not be qualified to testify as to causation. See *Dagner v. Anderson.* But see *Tahboub, 298 Va. at 376, 837 S.E.2d at 757.* An expert qualified to testify as to the standard of care in his field may not be qualified to testify as to the standard of care in another field. See *Dixon v. Sublett, 295 Va. 60, 67, 809 S.E.2d 617, 620–21 (2018).*

☞ ***PRACTICE POINTER:*** The report of the Medical Review Panel does not displace the need of an expert to establish the standard of care, deviation from the standard, and causation. *Raines, 231 Va. at 113 n. 3, 341 S.E.2d at 196* n.3.

### ***ALERTS:***

- This instruction should not be given where expert testimony on the appropriate standard of care is unnecessary because the alleged act of negligence clearly falls within the range of the jury's common knowledge and experience. *Summers v. Syptak, 293 Va. 606, 613, 801 S.E.2d 422, 425 (2017)*; *Webb v. Smith, 276 Va. 305, 308, 661 S.E.2d 457, 459 (2008)*; *Coston v. Bio-Med. Applications of Va., Inc., 275 Va. 1, 5, 654 S.E.2d 560, 562 (2008)*; *Beverly Enters.-Va., Inc., 247 Va. at 267–68, 441 S.E.2d at 3*; *Moates v. Hyslop, 253 Va. 45, 48, 480 S.E.2d 109, 111 (1997)*; *Dickerson, 253 Va. at 327, 484 S.E.2d at 881–882.* Also, "pure" expert testimony may not be required to prove medical causation where lay testimony, medical facts, and medical opinion is presented. *Kaiser Found. Health Plan of Mid-Atlantic States, Inc., 257 Va. at 498–500, 514 S.E.2d at 612–13*; *Moates, 253 Va. at 48–49, 480 S.E.2d at 111–12.*

- Podiatrists are not permitted to testify as experts against medical doctors and osteopaths in medical malpractice cases. Va. Code Ann. § 8.01-401.2:1.

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.060
## Opinion of Medical Malpractice Review Panel

**The opinion of the Medical Review Panel is not binding upon you. You should consider it along with the other evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-581.8.

**CASE AUTHORITY:** *Fairfax Hosp. Sys., Inc. v. McCarty, 244 Va. 28, 37–38, 419 S.E.2d 621, 627 (1992)*; *Speet v. Bacaj, 237 Va. 290, 296–98, 377 S.E.2d 397, 400 (1989)*; *Klarfeld v. Salsbury, 233 Va. 277, 281, 355 S.E.2d 319, 321 (1987)*; *Raines v. Lutz, 231 Va. 110, 115, 341 S.E.2d 194, 197 (1986).*

### PRACTICE COMMENTARY

Members of the review panel, except the chairman, may also be called to testify at the trial. Va. Code Ann. § 8.01-581.8. If a panel member testifies, it might be appropriate to insert "or the testimony of any panel member" after "Medical Review Panel."

The medical review panel consists of two attorneys, two health care providers, and a judge of the circuit in which the action was filed who serves as chairman. Va. Code Ann. § 8.01-581.3. Any party may request that the panel review a malpractice claim. Va. Code Ann. § 8.01-581.2. Pursuant to Va. Code Ann. § 8.01-581.7(A), the panel, after a hearing, must render one or more of the following opinions:

(1) The evidence does not support a conclusion that the health care provider failed to comply with the appropriate standard of care;

(2) The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages;

(3) The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is not a proximate cause in the alleged damages; or

(4) The evidence indicates that there is a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by a court or jury.

### *ALERTS:*

- The opinion of the Medical Malpractice Review Panel may only be admitted as evidence if the health care provider is still a party defendant at the time of trial. *Fairfax Hosp. Sys., Inc., 244 Va. at 37–38, 419 S.E.2d at 627.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.070
## Treatment Without Consent

**A doctor has a duty to obtain the consent of a patient before treating him. If a doctor treats without first obtaining his patient's consent, then he is liable for any injury to the patient which proximately results from the treatment, even though he exercised reasonable skill and diligence in providing the treatment.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Gross v. Stuart, 297 Va. 769, 775, 831 S.E.2d 726, 732 (2019)*; *Martin v. Lahti, 295 Va. 77, 84, 809 S.E.2d 644, 648 (2018)*; *Mayr v. Osborne, 293 Va. 74, 79–81, 795 S.E.2d 731, 735 (2017)*; *Washburn v. Klara, 263 Va. 586, 590–91, 561 S.E.2d 682, 685–86 (2002)*; *Pugsley v. Privette, 220 Va. 892, 899, 263 S.E.2d 69, 74 (1980).*

### Practice Commentary

Liability where there is no consent for the treatment performed is based on battery rather than negligence. This instruction applies whether consent should have been obtained from the patient himself, or, because of infancy or incompetency, from a guardian. See Chapter 36, Assault and Battery.

A "technical battery" may be proven where "(1) the patient placed terms or conditions on the consent for a particular procedure, and the doctor ignored those terms or conditions; (2) the physician intentionally performed an additional procedure beyond the procedure the patient consented to; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent." *Mayr, 293 Va. at 80, 795 S.E.2d at 735.*

*Gross, 297 Va. at 775–76, 831 S.E.2d at 732* upheld the trial court's election to give cautionary verbal instructions to the jury contemporaneous to counsel inappropriately inserting the issue of consent into his questioning and arguments, and found no error in not granting a mistrial or in failing to instruct the jury that consent was not an issue in the case.

### *ALERTS:*

- Do not use this instruction until you have read the Scope Note and Instruction No. 35.080, Treatment Without Informed Consent. This is not an informed consent instruction. This instruction applies where there was no consent at all, when consent was withdrawn, or when the consent that was obtained was for a different treatment or procedure. For treatment without consent because of an emergency, see Instruction No. 35.090, Lack of Consent: Emergencies.

- This instruction should not be given if the physician set about performing the procedure on a physical structure the patient consented to, but unintentionally performed the procedure in a location on that structure different from the one targeted. *Mayr, 293 Va. at 80–81, 795 S.E.2d at 735.* If the facts are not sufficient to permit an inference that the physician intended to disregard the patient's consent regarding the procedure or the scope of the procedure, the patient may have a claim for negligence, but not battery, against the physician. *Id. at 84–86, 795 S.E.2d at 737–38.*

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04
Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3
MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.080
## Treatment Without Informed Consent

**A doctor has a duty to obtain his patient's informed consent before he treats him. Informed consent means the consent of a patient after a doctor has given the patient all information about the treatment and its risks that would be given to a patient by a reasonably prudent practitioner in the doctor's field of practice or specialty. A doctor is not required, however, to tell a patient what he already knows or what any reasonably intelligent person would know.**

**If a doctor fails to perform this duty, then he is negligent and is liable for any injury proximately resulting from the doctor's treatment if you believe from the evidence that the patient would have refused the treatment if the doctor had disclosed the information.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Martin v. Lahti, 295 Va. 77, 84, 809 S.E.2d 644, 648 (2018)*; *Allison v. Brown, 293 Va. 617, 628–29, 801 S.E.2d 761, 768 (2017)*; *Tashman v. Gibbs, 263 Va. 65, 73–74, 556 S.E.2d 772, 777–78 (2002)*; *Rizzo v. Schiller, 248 Va. 155, 158–59, 445 S.E.2d 153, 155–56 (1994)*; *Bly v. Rhoads, 216 Va. 645, 648–51, 222 S.E.2d 783, 786–87 (1976)*.

### PRACTICE COMMENTARY

What disclosure is reasonable under the circumstances is generally to be determined by expert testimony. *Tashman, 263 Va. at 73, 556 S.E.2d at 777*; *Rizzo, 248 Va. at 159, 445 S.E.2d at 155*; *Bly, 216 Va. at 650–51, 222 S.E.2d at 787–88*.

A physician has a duty in the exercise of ordinary care to inform a patient of the dangers and possible negative consequences, as well as the alternatives to, a proposed medical treatment or procedure. *Tashman, 263 Va. at 73, 556 S.E.2d at 777*. The plaintiff need prove only that the physician did not adequately inform the plaintiff about the treatment and its risks, and that the lack of information caused the plaintiff to give consent that he would not otherwise have given. It is not a defense that the physician performed the treatment skillfully, or that the injury proximately caused by the treatment was predictable or unavoidable. *Allison, 293 Va. at 628–29, 801 S.E.2d at 768*.

Whether a patient would have refused treatment if given the necessary information may come from lay witness testimony but must be more than pure speculation. Lay witness testimony regarding whether the patient would have refused treatment if the doctor had disclosed the information, when the witnesses were not in the room when the doctor gave the patient the information, has been held as speculative. *Martin, 295 Va. at 84–88, 809 S.E.2d at 648–50*.

### *ALERTS:*

- Do not use this instruction until you have read the Scope Note and Instruction No. 35.070, Treatment Without Consent. This is an informed consent instruction. Informed consent is based upon a negligence theory. *Mayr v. Osborne, 293 Va. 74, 85, 795 S.E.2d 731, 738 (2017)*. The negligence lies in the doctor's failure to tell his patient all he needs to know. The proximate cause of the plaintiff's injuries must be that he was induced by the lack of information to undergo treatment that he would otherwise not have consented to.

- Instruction No. 35.080 was found to be ambiguous in *Allison, 293 Va. at 630–31, 801 S.E.2d at 769*, in the context of that case, where the plaintiff attempted to proceed on a theory of battery and negligence against a physician for operating on a body part without consent of the patient. The only jury instruction given concerning consent was Instruction No. 35.080. The jury returned a verdict in favor of the plaintiff. The Supreme Court of Virginia reversed, but remanded the case for a retrial on negligence. The Court held that Instruction No. 35.080 "lends itself to two interpretations." *Id.* Thus, while Instruction No. 35.080 is a correct statement

of the law, this instruction, as written, may not be appropriate when an issue in the case is whether the patient did not give any consent, or withdrew consent, to the procedure in question.

- The Supreme Court of Virginia has not addressed whether Virginia's law of informed consent includes an objective standard (that is, that a reasonably prudent person in the plaintiff's position would not have consented to treatment when provided with proper disclosures) or subjective standard (that *this* patient would not have consented in the face of the disclosures required by the standard of care).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.090
## Lack of Consent: Emergencies

**When immediate treatment is needed to protect a person's life or health and there is no reasonable method of obtaining consent for the treatment, then a doctor may give, without the patient's consent, such treatment as would be given by a reasonably prudent doctor in the same field of practice or specialty under the circumstances of this case.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

In *Washburn v. Klara, 263 Va. 586, 590, 561 S.E.2d 682, 685 (2002)*, the Court stated that consent is not required when an emergency exists or an unanticipated problem arises. The Court did not state the standard of care. "Treatment as would be given by a reasonably prudent doctor in the same field of practice or specialty under the circumstances of this case," however, appears to be the general rule. See, e.g., *Kennedy v. Parrott, 243 N.C. 355, 360–64, 90 S.E.2d 754, 757–60 (N.C. 1956)*; *Wheeler v. Barker, 92 Cal. App. 2d 776, 784–85, 208 P.2d 68, 71 (Cal. Dist. Ct. App. 1949)*; *Jackovach v. Yocom, 212 Iowa 914, 237 N.W. 444, 449–50 (Iowa 1931)*.

☞ ***PRACTICE POINTER:*** Whether an emergency existed is usually to be determined from expert testimony. Instruction No. 35.050, Proof of Standard of Care: Expert Testimony, may be used, substituting "whether an emergency existed" for "the degree of care that was required of the defendant."

### *ALERTS:*

- Under Virginia's Good Samaritan law, a doctor is not liable for his acts or omissions while giving assistance without compensation at the scene of an emergency. Va. Code Ann. § 8.01-225; Instruction No. 35.120, Good Samaritans.

- Va. Code Ann. § 54.1-2970 provides for medical treatment for certain persons who are receiving treatment in a facility operated by the Department of Behavior Health and Developmental Services or who are receiving case management services from a community services board or behavioral health authority and who are incapable of giving informed consent to the treatment by reason of mental illness or intellectual disability under certain specified conditions. The treatment provided must be related to a physical injury or illness and not to any treatment for a mental, emotional, or psychological condition.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.100
## Surgeon's Responsibility in Operating Room

**A surgeon performing an operation is responsible for any acts of negligence by anyone in the operating room who is subject to his control, regardless of who employs or pays that person.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Easterling v. Walton, 208 Va. 214, 219, 156 S.E.2d 787, 791 (1967).*

### PRACTICE COMMENTARY

The Supreme Court of Virginia has considered the role of an operating room surgeon as the "captain of the ship" in a medical malpractice case involving a foreign object was left in the patient's abdomen during surgery. *Easterling, 208 Va. at 219, 156 S.E.2d at 791.* In *Easterling*, the plaintiff's sister, who was a registered nurse at the hospital where the surgery was performed, testified that in procedures in that hospital's operating room, "the surgeon is the 'captain of the ship' and has complete control over the operation and the direction of all persons assisting him in the operating room." *Id. at 216, 156 S.E.2d at 789.* The Supreme Court held that the trial court erred in finding that the doctrine of *res ipsa loquitur* was not applicable under these facts:

> We hold that the *Res ipsa loquitur* doctrine, as we have construed its meaning and effect, was applicable under the facts of this case. Plaintiff's evidence shows that while she was in an unconscious state the defendant was in charge of and in complete control of the operation as "captain of the ship." The inadvertent failure of defendant to remove the lap pad from plaintiff's abdominal cavity before closing the operation wound constitutes such an act or omission in the performance of the duty owed to plaintiff that a layman could infer negligence without the aid of expert testimony. Thus plaintiff's evidence warranted an inference of negligence which should have been left to the jury, and it was error for the trial court to withdraw this question from their consideration.

*Id. at 219, 156 S.E.2d at 791.*

### *ALERTS:*

- The Supreme Court of Virginia has not recognized the "captain of the ship" doctrine as an independent basis to impose liability on a surgeon in a medical malpractice case. Given the Court's limited and narrow application of the "captain of the ship" doctrine, this instruction may only be appropriate when supported by expert testimony that the surgeon was acting as the "captain of the ship." See *Easterling, 208 Va. at 219, 156 S.E.2d at 791* (in a retained foreign object case, *res ipsa loquitur* was a question for the jury where registered nurse testified that the surgeon was the "captain of the ship" in the hospital's operating room).

- Where there is a question about who in the operating room is subject to the control of the surgeon, the jury should be given an appropriate instruction. See Chapter 8, Agency, Employment and Similar Relationships.

- For a discussion of the "captain of the ship" concept by United States District Courts in Virginia, see *Blevins v. Sheshadri, 313 F. Supp.2d 598, 602 (W.D. 2004)*; *Peck v. Tegtmeyer, 834 F. Supp. 903, 906–07 (W.D. Va. 1992).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.110
## Patient's Duty to Mitigate Damages

**A patient who is injured as a result of a physician's negligence has the duty to use ordinary care to avoid loss or minimize or lessen the resulting damage.**

**If a patient fails to perform this duty, he may recover for the injuries caused by his physician's negligence but not for the aggravation of any injuries or increase of damages resulting from his failure to use ordinary care.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Monahan v. Obici Med. Mgmt. Servs., Inc., 271 Va. 621, 636, 628 S.E.2d 330, 338–39 (2006)*; *Holley v. Pambianco, 270 Va. 180, 185, 613 S.E.2d 425, 428 (2005)*; *Sawyer v. Comerci, 264 Va. 68, 76–77, 563 S.E.2d 748, 753–54 (2002)*; *Lawrence v. Wirth, 226 Va. 408, 412–13, 309 S.E.2d 315, 317–18 (1983).*

### PRACTICE COMMENTARY

A mitigation of damages instruction is appropriate when the evidence shows that a plaintiff failed to mitigate his damages by neglecting his health following his physician's negligent treatment even if mitigation was not specifically pled as an affirmative defense provided the issue has otherwise been shown by the evidence. *Monahan, 271 Va. at 631–632, 628 S.E.2d at 336–37.*

The defense of contributory negligence can be a defense in a medical malpractice action. To constitute contributory negligence, a plaintiff's negligence must be contemporaneous with the claimed negligence of the health care provider. *Chandler v. Graffeo, 268 Va. 673, 681, 604 S.E.2d 1, 5 (2004)*; *Sawyer, 264 Va. at 75, 563 S.E.2d at 752–53*; *Gravitt v. Ward, 258 Va. 330, 335, 518 S.E.2d 631, 634 (1999).*

### *ALERTS:*

- This instruction pertains to mitigation of damages, as opposed to contributory negligence. It is applicable where there is evidence that a patient, after an act of malpractice, failed to exercise ordinary care for his own health and thus increased his damages.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 13 & 20

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE Chapter 23; § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

See also the Research References provided for Instruction No. 9.020 (Duty to Mitigate Damages)

## Instruction No. 35.120
## Good Samaritans

**A** [doctor; person] **who, in good faith, gives emergency care or assistance, without compensation, to any ill or injured person** [at the scene of an accident, fire, or any life-threatening emergency; at a location for screening or stabilization of an emergency medical condition arising from an accident, fire, or any life-threatening emergency; en route to any hospital, medical clinic, or doctor's office] **is not liable for his acts or omissions while giving such care.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-225.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

None.

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 8.01-225, currently only effective until January 1, 2022, covers additional emergency situations and should be consulted. Va. Code Ann. § 8.01-225.1 covers emergency treatment by school-team physicians.

Va. Code Ann. §§ 8.01-225.01 and 8.01-225.02 address immunity for health care providers during disasters.

Va. Code Ann § 8.01-225.03 concerns immunity for certain hospices, home care organizations, private providers, assisted living facilities, and adult day care centers during a public health emergency related to the COVID-19 virus declared by the Governor. This immunity is time-limited. For the effective date see subsection (d).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Physicians and Surgeons §§ 12 through 21

**Instruction No. 35.130**
**Duty of Hospitals**

**A hospital has the duty to exercise reasonable care and attention for a patient's safety as his mental and physical condition, if known, may require.**

**If a hospital fails to perform this duty, then it is negligent.**

**You must determine the degree of care that was required of the hospital by considering only the expert testimony on that subject.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 535–36, 636 S.E.2d 416, 426–27 (2006)*; *Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 268, 441 S.E.2d 1, 3 (1994)*; *Danville Cmty. Hosp., Inc. v. Thompson, 186 Va. 746, 757, 43 S.E.2d 882, 886 (1947)*; *Stuart Circle Hosp. Corp. v. Curry, 173 Va. 136, 148, 3 S.E.2d 153, 158 (1939).*

### PRACTICE COMMENTARY

A charitable hospital does not have immunity from liability if it fails to use due care in the selection and retention of its employees and agents. *Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 707, 133 S.E.2d 559, 562 (1963)*; *Hill v. Leigh Mem'l Hosp., Inc., 204 Va. 501, 507, 132 S.E.2d 411, 415 (1963)*; *Memorial Hosp., Inc. v. Oakes, 200 Va. 878, 885, 108 S.E.2d 388, 393 (1959).*

A charitable hospital does not have immunity from other tort liability unless it complies with the requirements stated in Va. Code Ann. § 8.01-38. The hospital must either give exclusively charitable medical services, for which the patient is never charged, or the plaintiff must have been provided with an express written agreement at the time of admission stating that all medical services furnished to him by the hospital were to be free. Va. Code Ann. § 8.01-38 also limits the amount of damages that can be recovered against a hospital that has liability insurance and is tax exempt under 26 U.S.C. § 501(c)(3).

### *ALERTS:*

- Va. Code Ann. § 8.01-581.20 sets forth the law on malpractice and applies to hospitals as well as doctors. See Instruction Nos. 35.000, Statewide Standard of Care, and 35.010, Statewide or Local Standard of Care.

- Va. Code Ann. § 54.1-2970 covers medical treatment for persons receiving treatment in a facility operated by the Department of Behavior Health and Developmental Services or persons who are receiving case management services from a community services board or behavioral health authority and who may be incapable of providing informed consent to the treatment by reason of mental illness or intellectual disability under certain specified conditions. The treatment provided must be related to a physical injury or illness and not to any treatment for a mental, emotional, or psychological condition.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 20

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.04

Kent Sinclair, VIRGINIA REMEDIES, Chapter 32; § 25-3

MICHIE'S JURISPRUDENCE, Hospitals and Sanitariums §§ 5 through 8; Physicians and Surgeons §§ 12 through 21

## Instruction No. 35.200
## Duty of Architects

**An architect has a duty to use reasonable care in** [preparing plans for designing; supervising the construction of] **a building. Reasonable care is the care that an ordinarily skilled architect would use.**

**If an architect fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Nelson v. Commonwealth, 235 Va. 228, 236–37, 368 S.E.2d 239, 243–44 (1988)*; *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988)*; *Blake Constr. Co., Inc. v. Alley, 233 Va. 31, 34–35, 353 S.E.2d 724, 726 (1987)*; *Comptroller of Va. ex rel. VMI v. King, 217 Va. 751, 760–61, 232 S.E.2d 895, 901 (1977)*; *Willner v. Woodward, 201 Va. 104, 108, 109 S.E.2d 132, 134 (1959)*; *Surf Realty Corp. v. Standing, 195 Va. 431, 442–43, 78 S.E.2d 901, 907–08 (1953)*.

### PRACTICE COMMENTARY

The essence of the reported Virginia cases on architect liability is that the terms of the contract between the architect and his client may govern many aspects of their relationship and that, where the contract does not control, the architect has a duty to exercise ordinary care in his work.

Expert testimony is generally required to establish an architect's standard of care and whether an architect departed from said standard. *Nelson, 235 Va. 236–37, 368 S.E.2d 243–44*.

In *Comptroller of Va. ex rel. VMI, 217 Va. at 760–61, 232 S.E.2d at 901*, the Court said that the architect's duty to supervise construction also included, because of a contractual provision, the duty to detect defects in the design and recommend changes to the owner.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Building Contracts §§ 1 through 31

## Instruction No. 35.300
## Implied Warranty—Construction Contract

**In building and construction contracts it is implied that the building shall be erected in a reasonably good and workmanlike manner in accordance with the accepted building practices in the community and when completed shall be reasonably fit for the intended purpose.**

**If a builder fails to perform this duty, then he is negligent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Clevert v. Jeff W. Soden, Inc., 241 Va. 108, 111, 400 S.E.2d 181, 183 (1991)*; *Mann v. Clowser, 190 Va. 887, 900–01, 59 S.E.2d 78, 84–85 (1950).*

### PRACTICE COMMENTARY

Va. Code Ann. § 55.1-357 provides for an implied warranty in every contract for the sale of a new dwelling. When the cause of action involves the sale of a new home, this instruction should be modified to incorporate the warranties provided in the statute.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Building Contracts §§ 1 through 31

# Chapter 36

# ASSAULT AND BATTERY

## Scope Note

**Instruction No. 36.000 Definition of Battery**
**Instruction No. 36.010 Definition of Assault**
**Instruction No. 36.020 Self-Defense**
**Instruction No. 36.030 Arrest: Permissible Force**
**Instruction No. 36.040 Arrest: Right to Resist**
**Instruction No. 36.050 Burden of Proof: No Affirmative Defense**
**Instruction No. 36.060 Burden of Proof: Affirmative Defense**
**Instruction No. 36.070 Finding Instruction: Battery—No Affirmative Defenses**
**Instruction No. 36.071 Finding Instruction: Assault—No Affirmative Defenses**
**Instruction No. 36.080 Finding Instruction: Battery—Affirmative Defenses**
**Instruction No. 36.081 Finding Instruction: Assault—Affirmative Defenses**
**Instruction No. 36.090 Compensatory Damages**

# SCOPE NOTE

The instructions in this chapter cover common law assault and battery and affirmative defenses to these torts. Instruction No. 36.000 defines "battery"; Instruction No. 36.010 defines "assault." Although most cases involve both an assault and a battery, they are two legally distinct torts. For example, a battery requires a touching but, if the touch comes as a surprise, there may not be an assault. An assault is completed with a threatening gesture even if there is no contact.

The most common defense to assault and battery is self-defense. The varied situations in which self-defense can arise include defense of self, defense of others, and defense of property. The distinct principles applicable to the reasonableness of the force used—which party was the aggressor, whether the initial aggressor tried to withdraw, etc.—make drafting a pattern instruction difficult. Instruction No. 36.020 therefore is offered as a guide from which a more specific instruction or instructions tailored to the facts and specific self-defense principles applicable to an individual case may be developed.

Since many assault and battery cases arise in the context of an arrest, two general instructions are offered to cover the basic legal principles applicable in such cases. Instruction No. 36.030 addresses the primary principles applicable to the use of force to make an arrest. Instruction No. 36.040 addresses the primary principles applicable to the amount of force that may or may not be used to resist an arrest. Whether or not an arrest is lawful is discussed in the extended Practice Commentary to Instruction No. 38.020, Lawful Arrest, in the chapter entitled False Imprisonment.

The burden of proof instructions, Instructions No. 36.050 and 36.060, and the finding instructions, Instructions No. 36.070, 36.071, 36.080, and 36.081, are standard. No issue instruction is offered because none is needed if the case involves only assault and battery. If false arrest, defamation, or malicious prosecution is also involved, as is often the case, an issue instruction will have to be prepared based on the facts of that case. Either the general instruction on negligence issues, Instruction No. 3.000, Negligence: Issues and Allocation of Burdens of Proof, or the specific one in regard to defamation, Instruction No. 37.000, Liability Issues (Public Figure/ Defamatory *Per Se*) can serve as a starting point.

Instruction No. 36.090 is a compensatory damage instruction specifically designed for an assault and battery case. If a claim for punitive damages is submitted to the jury, the appropriate punitive damages instructions should be given. See Instructions No. 9.080, General Punitive Damages, 9.090, Punitive Damages: Definition of Common Law Actual Malice, and 4.040, Definition of Willful and Wanton Conduct. Note that provocation, though not a defense to an assault or battery, may be offered in mitigation of damages. *Norfolk & W. R. v. Brame, 109 Va. 422, 428–430, 63 S.E. 1018, 1021–22 (1909)*; *Ward v. White, 86 Va. 212, 219, 9 S.E. 1021, 1023 (1889).*

Va. Code Ann. § 8.01-226.9 provides a merchant with limited immunity from civil liability for assault and battery for the detention of a customer suspected of shoplifting. The immunity does not extend to conduct which is willful, wanton, or otherwise unreasonable or excessive. *Jury v. Giant of Maryland, Inc., 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997).*

Va. Code Ann. § 22.1-279.1 prohibits corporal punishment in schools, but notes that the prohibition does not prevent the use of reasonable force to maintain order, quell a disturbance, prevent injury, etc. A parallel criminal statute, Va. Code Ann. § 18.2-57(G), states that the same reasonable force shall not be construed as a simple assault or assault and battery.

Va. Code Ann. § 19.2-83.3, *et seq.* defines circumstances under which neck restraints, use of deadly force, discharge of a firearm, and other conduct of a law enforcement officer may constitute an assault.

Recovery for an assault and battery occurring in the course of the injured person's employment is governed by the Workers' Compensation Act if the conduct is directed at the victim as an employee or if the conditions of employment are a contributing cause of the risk of injury. *Hilton v. Martin, 275 Va. 176, 180–81, 654 S.E.2d 572, 574–75 (2008).* However, if the assault and battery is personal to the employee and is not directed against him as an employee or because of his employment, the injury does not arise out of the employment and is not governed by the *Workers' Compensation Act. Id. at 181, 654 S.E.2d at 574–75.*

## Instruction No. 36.000
## Definition of Battery

**A battery is an intentional and unwanted touching of another without justification, excuse, or the consent of the other.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003)*; *Pugsley v. Privette, 220 Va. 892, 899–900, 263 S.E.2d 69, 74 (1980)*; *Pike v. Eubank, 197 Va. 692, 700–01, 90 S.E.2d 821, 827 (1956)*; *Lynch v. Commonwealth, 131 Va. 762, 764–66, 109 S.E. 427, 427–28 (1921).*

## Practice Commentary

The instruction defining battery conforms to the definition of battery relied on by the Supreme Court in *Koffman, 265 Va. at 16, 574 S.E.2d at 261.* The Court in *Koffman* did not expressly disapprove of prior formulations of the tort and did not expressly overrule the cases that quoted previous definitions with approval. *Id.*; *see Crosswhite v. Barnes, 139 Va. 471, 477, 124 S.E. 242, 244 (1924)* (defining a battery as a touching "done in a rude, insolent, or angry manner"); *Pugsley, 220 Va. at 899, 263 S.E.2d at 74.*

Someone who encourages another to commit an assault or a battery may be liable even if he did not commit the assault. *Pike, 197 Va. at 697–99, 90 S.E.2d at 825–26.*

A doctor may be liable for assault or battery for an unconsented operation. *Pugsley, 220 Va. at 899, 263 S.E.2d at 74* (noting that an unconsented operation is "a technical battery"). A doctor who exceeds the scope of the patient's permission to treat or operate may also be liable for assault or battery. *Washburn v. Klara, 263 Va. 586, 590–92, 561 S.E.2d 682, 685–86 (2002)*; *Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990).* A technical battery is present where "(1) the patient placed terms or conditions on consent for a particular procedure, and the doctor ignored those terms or conditions; (2) the physician intentionally performed an additional procedure beyond the procedure the patient consented to; or (3) the physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent." *Mayr v. Osborne, 293 Va. 74, 80, 795 S.E.2d 731, 735 (2017) Mayr* held that a doctor is not liable for a battery if he or she performed an additional or different procedure due to negligence. *Id. at 86, 795 S.E.2d at 738.* For battery, the plaintiff must establish a prima facie case that the physician performed an operation "against the patient's will or substantially at variance with the consent given." *Id. at 84, 795 S.E.2d at 737.* The facts must permit an inference that the doctor "intended to disregard the patient's consent regarding the procedure or the scope of the procedure." *Id. at 84, 795 S.E.2d at 737.* See Instruction No. 35.070, Treatment Without Consent.

While the "fireman's rule" bars actions by firefighters and police officers for personal injuries sustained by them in the performance of their official duties resulting from the negligence of others, it does not bar such claims where the injuries are intentionally inflicted. *Goodwin v. Hare, 246 Va. 402, 403–04, 436 S.E.2d 605, 605–06 (1993)* (involving the assault of police officer by defendant in

resisting a lawful arrest).

Va. Code Ann. § 8.01-226.9 provides a merchant limited immunity from civil liability for assault and battery for the detention of a customer suspected of shoplifting. The immunity does not extend to conduct that is willful, wanton, or otherwise unreasonable or excessive. *Jury v. Giant of Maryland, Inc., 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997).*

Under Va. Code Ann. § 8.01-418, a plea of guilty or nolo contendere as shown by the records of the criminal court is admissible in a civil action. "Although admissible, a guilty plea does not constitute a preclusive bar under the doctrine of judicial estoppel unless the parties are the same." *Mikhaylov v. Sales, 291 Va. 349, 356–57, 784 S.E.2d 286, 289–90 (2016).* Because the Commonwealth and a crime victim are not considered synonymous parties or privies, judicial estoppel does not prevent the defendant from offering evidence, including testimony seeking to deny or explain away his guilty plea. *Id.*

A guilty plea to assault and battery in the general district court is annulled by virtue of an appeal to the circuit court and is therefore inadmissible in a civil action for assault and battery arising out of the same occurrence, either as a party admission, prior inconsistent statement, or pursuant to Va. Code Ann. § 8.01-418. *Santen v. Tuthill, 265 Va. 492, 496–97, 578 S.E.2d 788, 790–91 (2003).*

☞ ***PRACTICE POINTER:*** An officer making a lawful arrest may use reasonable force. See Instruction No. 36.030, Arrest: Permissible Force. Va. Code Ann. § 19.2-83.3, *et seq.* defines circumstances under which neck restraints, use of excessive force, discharge of a firearm, and other conduct of a law enforcement officer may constitute an assault.

### ***ALERTS:***

- Assault and battery does not include the incidental physical contact or use of reasonable and necessary force by a teacher, teacher aide, principal, assistant principal, guidance counselor, security officer, school bus driver, or school bus aide, while acting within the scope of their official capacity, when the contact is occasioned by, or the force is used for, the specific purposes enumerated in Va. Code Ann. § 18.2-57(G); *see* also Va. Code Ann. § 22.1-279.1; *Mulvey v. Jones, 41 Va. App. 600, 603–04, 587 S.E.2d 728, 730 (2003)* (discussing Va. Code Ann. § 22.1-279.1 in an administrative proceeding involving physical violence by a teacher against a student).

- Recovery for an assault and battery occurring in the course of the injured person's employment is governed by the Workers' Compensation Act if the conduct is directed at the victim as an employee or if the conditions of employment are a contributing cause of the risk of injury. However, if the assault and battery is personal to the employee and is not directed against him as an employee or because of his employment, the injury does not arise out of the employment and is not governed by the Workers' Compensation Act. *Hilton v. Martin, 275 Va. 176, 180–81, 654 S.E.2d 572, 574–75 (2008).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

## Instruction No. 36.010
## Definition of Assault

**An assault is any threatening act that is intended to put another person in reasonable fear of imminent physical injury.** [Words alone are never an assault.]

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Clark v. Commonwealth, 279 Va. 636, 641, 691 S.E.2d 786, 788–89 (2010)*; *Bowie v. Murphy, 271 Va. 127, 136, 624 S.E.2d 74, 80 (2006)*; *Carter v. Commonwealth, 269 Va. 44, 46–47, 606 S.E.2d 839, 841 (2005)*; *Etherton v. Doe, 268 Va. 209, 213, 597 S.E.2d 87, 89 (2004)*; *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003).*

### Practice Commentary

The Supreme Court of Virginia, in *Koffman, 265 Va. at 16, 574 S.E.2d at 261,* stated that the tort of assault consists "of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." See also *Etherton, 268 Va. at 213, 597 S.E.2d at 89.*

In *Bowie*, the allegation that the defendant attempted to strike the plaintiff, placing the plaintiff in fear of a physical injury, was held sufficient to plead the elements of assault. The fact that a person completes a battery does not negate an assault claim from the anticipation of that battery. *271 Va. at 136, 624 S.E.2d at 80.*

Assault and battery are two separate and independent torts. *Koffman, 265 Va. at 16, 574 S.E.2d at 261.*

Physical contact or injury, or even an actual present ability to cause physical injury, is not required for an assault. *Bowie, 271 Va. at 136, 624 S.E.2d at 80*; *Carter, 269 Va. at 47–48, 606 S.E.2d at 841–42.*

For a comparison of the definition of assault in a criminal context and a civil context, see *Clark, 279 Va. at 641, 691 S.E.2d 788–89*; see also *A.R.A. v. Commonwealth, 295 Va. 153, 158–59, 809 S.E.2d 660, 663 (2018).*

While words alone are insufficient to constitute assault, they are highly relevant in shedding light on intent. *Clark, 279 Va. at 641–42, 691 S.E.2d at 789.*

☞ ***Practice Pointer:*** The familiar "words alone" language is bracketed because most cases involve some overt act. If there was no such act, or if such act is disputed, the bracketed language should be used.

### *Alerts:*

- Assault and battery does not include the incidental physical contact or use of reasonable and necessary force by a teacher, teacher aide, principal, assistant principal, guidance counselor, security officer, school bus driver, or school bus aide, while acting within the scope of their official capacity, when the contact is occasioned by, or the force is used for, the specific purposes enumerated in Va. Code Ann. § 18.2-57(G). See also Va. Code Ann. § 22.1-279.1; *Mulvey v. Jones, 41 Va. App. 600, 603–04, 587 S.E.2d 728, 730 (2003)* (discussing Va. Code Ann. § 22.1-279.1 in an administrative proceeding involving physical violence by a teacher against a student).

• Recovery for an assault and battery occurring in the course of the injured person's employment is governed by the Workers' Compensation Act if the conduct is directed at the victim as an employee or if the conditions of employment are a contributing cause of the risk of injury. However, if the assault and battery is personal to the employee and is not directed against him as an employee or because of his employment, the injury does not arise out of the employment and is not governed by the Workers' Compensation Act. *Hilton v. Martin, 275 Va. 176, 180–81, 654 S.E.2d 572, 574–75 (2008).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

## Instruction No. 36.020
## Self-Defense

**A person who suffers, or is threatened with, an assault and battery that he did not provoke has a right to use as much force in self-defense to protect himself as is reasonably necessary.**

[It is unreasonable to continue to use force if the other party withdraws from the fight in good faith and discloses a desire to terminate the fight.]

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Hines v. Commonwealth, 292 Va. 674, 679, 791 S.E.2d 563, 565 (2016)*; *Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990)*; *Parker v. McCoy, 212 Va. 808, 812, 188 S.E.2d 222, 225 (1972)*; *Harper v. Commonwealth, 196 Va. 723, 729–30, 85 S.E.2d 249, 253 (1955)*; *Banks v. Bradley, 192 Va. 598, 603, 66 S.E.2d 526, 529 (1951)*; *Wilkinson v. Allen, 136 Va. 607, 620–21, 118 S.E. 94, 98 (1923).*

## Practice Commentary

"[T]he right to defend another is commensurate with self-defense." *Foster v. Commonwealth, 13 Va. App. 380, 385–86, 412 S.E.2d 198, 201–02 (1991).* A defendant may claim defense of others "only where he or she reasonably believes based on the attendant circumstances, that the person defended is without fault in provoking the fray." *Id. at 386, 412 S.E.2d at 202.*

Where the defendant claims self-defense, proof of prior specific acts of the plaintiff may be admissible to show his character for turbulence and violence, but proof of only one specific act of aggressive and violent conduct may not be admitted for that purpose. *McMinn v. Rounds, 267 Va. 277, 281–82, 591 S.E.2d 694, 697 (2004).* "[T]his statement of the law has been qualified. [T]he ultimate issue becomes whether such evidence of prior conduct was sufficiently connected in time and circumstances with the homicide as to be likely to characterize the victim's conduct toward the defendant." *Avent v. Commonwealth, 279 Va. 175, 206–07, 688 S.E.2d 244, 261 (2010)*; see also *Carter v. Commonwealth, 293 Va. 537, 546–47, 800 S.E.2d 498, 503 (2017).*

Although it is permissible to use force to defend property, the use of violence does not extend to the taking of human life or the infliction of great bodily harm. *Commonwealth v. Alexander, 260 Va. 238, 241, 531 S.E.2d 567, 568 (2000).*

"A deadly weapon may not be brandished solely in defense of personal property." *Alexander, 260 Va. at 242, 531 S.E.2d at 569.*

"Generally speaking, consent of the person assaulted is a good defense except where the consent is obtained by fraud or where the peace and dignity of the State are involved." *Banovitch v. Commonwealth, 196 Va. 210, 219, 83 S.E.2d 369, 375 (1954).* But see *Adams v. Commonwealth, 163 Va. 1053, 1058, 178 S.E. 29, 30–31 (1935)* ("[o]ne will not be permitted to invite another to commit a common law assault upon him and then justify a repellant assault on the ground of self-defense").

"If while preparing to defend himself in his home, the homeowner accidentally kills the intruder, he may still be entitled to acquittal on the grounds of self-defense." *Lienau v. Commonwealth, 69 Va. App. 254, 275, 818 S.E.2d 58, 68 (2018).*

Provocation is not a defense to assault and battery, but evidence of provocation

might be admissible in mitigation of the "evil" of the assault and battery and of damages. *Ward v. White, 86 Va. 212, 216–19, 9 S.E. 1021, 1022–23 (1889).*

A defendant who was the initial aggressor can only claim self-defense if he had "withdrawn in good faith from the conflict and disclosed his desire to so terminate the encounter," and the plaintiff then did "some overt act which indicated that he intended to continue or resume the conflict. . . ." *Banks, 192 Va. at 604, 66 S.E.2d at 529.*

### *ALERTS:*

- Assault and battery does not include incidental, minor or reasonable physical contact or other actions designed to maintain order and control, or use of reasonable and necessary force by a school security officer or full-time or part-time employee of any public or private elementary or secondary school while acting within the scope of their official capacity, when the contact is occasioned by, or the force is used for, the specific purposes enumerated in Va. Code Ann. § 18.2-57(G). See also Va. Code Ann. § 22.1-279.1, prohibiting corporal punishment; *Mulvey v. Jones, 41 Va. App. 600, 587 S.E.2d 728 (2003)*, mentioning Va. Code Ann. § 22.1-279.1 in an administrative proceeding involving physical violence by a teacher against his student.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.030**
**Arrest: Permissible Force**

**An officer has the right to use reasonable force to make a lawful arrest. Use of that force is not an assault or battery. Within reasonable limits, an officer is the judge of the amount of force necessary to make a lawful arrest.**

**Any force used in making an unlawful arrest is an assault and battery.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 19.2-83.3, *et seq.*

**Case Authority:** *Cromartie v. Billings, 298 Va. 284, 308, 837 S.E.2d 247, 260 (2020)*; *Parker v. McCoy, 212 Va. 808, 813, 188 S.E.2d 222, 226 (1972)*; *Pike v. Eubank, 197 Va. 692, 698, 90 S.E.2d 821, 825 (1956)*; *Banks v. Bradley, 192 Va. 598, 603, 66 S.E.2d 526, 529 (1951)*; *Lane v. Commonwealth, 190 Va. 58, 73, 55 S.E.2d 450, 457 (1949)*; *Davidson v. Allam, 143 Va. 367, 373, 130 S.E. 245, 246 (1925). Crosswhite v. Barnes, 139 Va. 471, 485, 124 S.E. 242, 246 (1924).*

### Practice Commentary

This instruction is a general, or guide, instruction covering the basic assault and battery principles initially applicable to an arrest. Since such cases arise in many varied factual and procedural postures (e.g., whether the lawfulness of the arrest has been determined as a matter of law or is submitted to the jury for determination; whether or not the reasonableness of the amount of force employed is a jury issue, etc.), an instruction applicable to all possible situations likely would be unwieldy and convoluted, even if technically possible. In order to address the issues in a specific case, therefore, this instruction likely will require modification.

For instance, an officer's right to use reasonable force to make an arrest is a common law right. Where the issue is the reasonableness of the amount of force used, and not whether the arrest was lawful, the final sentence of the instruction may be unnecessary.

Additional instructions may need to be drafted to address subsidiary principles related to use of force, such as whether the arrest was for a misdemeanor or a felony or whether flight from arrest posed a threat of danger to the officer or to the public.

When the lawfulness of an arrest is in issue, Instruction No. 36.040, Arrest: Right to Resist (or a modified version), also may be appropriate.

☞ ***Practice Pointer:*** For a discussion on what is and what is not a lawful arrest, see Instruction No. 38.020, Lawful Arrest. Va. Code Ann. § 19.2-83.3, *et seq.* defines circumstances under which neck restraints, use of excessive force, discharge of a firearm, and other conduct of a law enforcement officer may constitute an assault.

### *ALERTS:*

- An officer may use deadly force to arrest a fleeing felony suspect if necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others. *Tennessee v. Garner, 471 U.S. 1 (1985).*

- Wounding or killing a fleeing misdemeanant to arrest him or to prevent his escape is excessive force. *Broaddus v. Standard Drug Co.*, 211 Va. 645, 657, 179 S.E.2d 497, 506 (1971).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.040**
**Arrest: Right to Resist**

**A person has the right to use reasonable force to resist an unlawful arrest. The use of that force is not an assault or battery.**

**Any force used in resisting a lawful arrest is an assault and battery.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Cromartie v. Billings, 298 Va. 284, 308, 837 S.E.2d 247, 260 (2020)*; *Brown v. Commonwealth, 27 Va. App. 111, 116–18, 497 S.E.2d 527, 529–30 (1998)*; *Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990)*; *Broaddus v. Standard Drug Co., 211 Va. 645, 652, 179 S.E.2d 497, 503 (1971)*; *Banner v. Commonwealth, 204 Va. 640, 646–47, 133 S.E.2d 305, 310 (1963)*; *Banks v. Bradley, 192 Va. 598, 603, 66 S.E.2d 526, 529 (1951)*.

### PRACTICE COMMENTARY

As with Instruction No. 36.030, Arrest: Permissible Force, this instruction is a guide or general instruction covering the basic assault and battery principles applicable to resisting arrest where a single instruction applicable to all possible circumstances would prove unwieldy and convoluted. In order to address the issues in a specific case, this instruction likely will require modification (e.g., in cases where the arrest has been determined to be unlawful as a matter of law, the second paragraph of this instruction would be unnecessary.

When the lawfulness of an arrest is a jury issue, Instruction No. 36.030, Arrest: Permissible Force (or a modified version) may be appropriate to use in conjunction with this instruction.

In *Commonwealth v. Hill, 264 Va. 541, 546–48, 570 S.E.2d 805, 808–09 (2002)*, the Supreme Court of Virginia refused to extend the common law right to use reasonable force to resist an unlawful arrest to an unlawful detention or pat down search.

An officer's good faith in making the arrest is immaterial. If the arrest is illegal, it may be resisted. *Brown, 27 Va. App. at 116–17, 497 S.E.2d at 529–30.*

☞ ***PRACTICE POINTER:*** For a discussion of what is and what is not a lawful arrest, see Instruction No. 38.020, Lawful Arrest.

"[T]he right to defend another is commensurate with self-defense." *Foster v. Commonwealth, 13 Va. App. 380, 385–86, 412 S.E.2d 198, 201–02 (1991)*. A defendant may claim defense of others "only where he or she reasonably believes based on the attendant circumstances, that the person defended is without fault in provoking the fray." *Id. at 386, 412 S.E.2d at 202.*

### ***ALERTS:***

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

## Instruction No. 36.050
## Burden of Proof: No Affirmative Defense

**The burden is on the plaintiff to prove** [assault; battery; assault and battery] by the greater weight of all the evidence.

**The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Pike v. Eubank, 197 Va. 692, 701, 90 S.E.2d 821, 827 (1956)*; *Matthews v. LaPrade, 144 Va. 795, 800–03, 812, 130 S.E. 788, 790, 793 (1925)*; *Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va. 137, 156–58, 104 S.E. 371, 377 (1920).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

## Instruction No. 36.060
## Burden of Proof: Affirmative Defense

**The burden is on the plaintiff to prove** [assault; battery; assault and battery] by a preponderance of the evidence.

**The burden is on the defendant to prove** [self-defense; that he was making a lawful arrest] by a preponderance of the evidence.

**The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive, when evaluated against all the evidence that has been admitted in the case. The testimony of one witness whom you believe can be the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Riley v. Commonwealth, 277 Va. 467, 479–80, 675 S.E.2d 168, 175 (2009)*; *Pike v. Eubank, 197 Va. 692, 701, 90 S.E.2d 821, 827 (1956)*; *Matthews v. LaPrade, 144 Va. 795, 800–03, 812, 130 S.E. 788, 790, 793 (1925)*; *Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va. 137, 156, 104 S.E. 371, 377 (1920)*.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.070**
**Finding Instruction: Battery—No Affirmative Defenses**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence that:**

**(1) the defendant intentionally touched the plaintiff; and**

**(2) the touching was unwanted; and**

**(3) the touching was without justification, excuse, or the plaintiff's consent.**

**You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the above elements.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003)*; *Pugsley v. Privette, 220 Va. 892, 899–900, 263 S.E.2d 69, 74 (1980)*; *Pike v. Eubank, 197 Va. 692, 700–01, 90 S.E.2d 821, 827 (1956)*; *Lynch v. Commonwealth, 131 Va. 762, 764–66, 109 S.E. 427, 427–28 (1921).*

### PRACTICE COMMENTARY

See the Practice Commentary for Instruction No. 36.000, Definition of Battery.

### *ALERTS:*

- Use this finding instruction only where no affirmative defense is presented as a jury issue. Use this instruction with Instruction No. 36.050, Burden of Proof, No Affirmative Defense. If an affirmative defense is presented as a jury issue, use Instructions No. 36.060, Burden of Proof: Affirmative Defense and 36.080, Finding Instruction: Battery—Affirmative Defenses, as the burden of proof and finding instructions.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.071**
**Finding Instruction: Assault—No Affirmative Defenses**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally threatened him by some act that put him in reasonable fear of imminent physical injury. Intent may be inferred from the nature of the act and the surrounding circumstances.**

**You shall find your verdict for the defendant if the plaintiff failed to prove an assault.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Clark v. Commonwealth, 279 Va. 636, 641, 691 S.E.2d 786, 789 (2010)*; *Bowie v. Murphy, 271 Va. 127, 136, 624 S.E.2d 74, 80 (2006)*; *Carter v. Commonwealth, 269 Va. 44, 46–47, 606 S.E.2d 839, 841 (2005)*; *Etherton v. Doe, 268 Va. 209, 213, 597 S.E.2d 87, 89 (2004)*; *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003).*

### PRACTICE COMMENTARY

Use this finding instruction only where no affirmative defense is presented as a jury issue. Use this instruction with Instruction No. 36.050, Burden of Proof, No Affirmative Defense. If an affirmative defense is presented as a jury issue, use Instructions No. 36.060, Burden of Proof: Affirmative Defense and 36.080, Finding Instruction: Battery—Affirmative Defenses, as the burden of proof and finding instructions. See Practice Commentary to Instruction No. 36.010, Definition of Assault.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.080**
**Finding Instruction: Battery—Affirmative Defenses**

**You shall find your verdict for the plaintiff if the plaintiff proved by the greater weight of the evidence that:**

**(1) the defendant intentionally touched the plaintiff; and**

**(2) the touching was unwanted; and**

**(3) the touching was without justification, excuse, or the plaintiff's consent.**

**You shall find your verdict for the defendant:**

**(1) if the plaintiff failed to prove a battery; or**

**(2) if the defendant proved by the greater weight of the evidence that he acted in self-defense.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003)*; *Pugsley v. Privette, 220 Va. 892, 899–900, 263 S.E.2d 69, 74 (1980)*; *Pike v. Eubank, 197 Va. 692, 700–01, 90 S.E.2d 821, 827 (1956)*; *Lynch v. Commonwealth, 131 Va. 762, 764–66, 109 S.E. 427, 427–28 (1921).*

### PRACTICE COMMENTARY

Use this instruction when affirmative defenses are presented as jury issues. Use with Instruction No. 36.060, Burden of Proof: Affirmative Defenses. If no affirmative defenses are raised, use Instructions No. 36.050, Burden of Proof: No Affirmative Defenses and 36.070, Finding Instruction: Battery—No Affirmative Defenses.

☞ ***PRACTICE POINTER:*** Legal arrest, defense of a close relative or of others, defense of property, and the like are possible affirmative defenses; they may be substituted for self-defense in subparagraph (2) or added as additional subparagraphs when supported by the evidence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

## Instruction No. 36.081
## Finding Instruction: Assault—Affirmative Defenses

**You shall find your verdict for the plaintiff if the plaintiff proved by the greater weight of the evidence that the defendant intentionally threatened him by some act that put him in reasonable fear of imminent physical injury. Intent may be inferred from the nature of the act and the surrounding circumstances.**

**You shall find your verdict for the defendant:**

**(1) if the plaintiff failed to prove an assault; or**

**(2) if the defendant proved by the greater weight of the evidence that he acted in self-defense.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Clark v. Commonwealth, 279 Va. 636, 640–43, 691 S.E.2d 786, 789–90 (2010)*; *Bowie v. Murphy, 271 Va. 127, 136, 624 S.E.2d 74, 80 (2006)*; *Carter v. Commonwealth, 269 Va. 44, 46–49, 606 S.E.2d 839, 841–42 (2005)*; *Etherton v. Doe, 268 Va. 209, 213, 597 S.E.2d 87, 89 (2004)*; *Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003).*

### PRACTICE COMMENTARY

Use this instruction when affirmative defenses are presented as jury issues. Use with Instruction No. 36.060, Burden of Proof: Affirmative Defense. If no affirmative defenses are raised, use Instructions No. 36.050, Burden of Proof: No Affirmative Defenses and 36.070, Finding Instruction: Battery—No Affirmative Defenses.

☞ ***PRACTICE POINTER:*** Legal arrest, defense of a close relative, defense of property, and the like are possible affirmative defenses; they may be substituted for self-defense in subparagraph (2) or added as additional subparagraphs when supported by the evidence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

**Instruction No. 36.090**
**Compensatory Damages**

**If you find your verdict in favor of the plaintiff, then in determining the damages to which he is entitled you may consider any of the following you believe by the greater weight of the evidence was caused by the** [assault; battery; assault and battery] **committed by the defendant:**

**(1) all financial loss resulting from the injury the defendant caused to the plaintiff;**

**(2) all physical injury the plaintiff suffered;**

**(3) any shame, humiliation, embarrassment, or indignity the plaintiff suffered.**

**In awarding damages, you may also consider the insulting character of the injury to the plaintiff, the defendant's reason for injuring the plaintiff, and any other circumstances shown by the evidence which make the injury more serious.**

**Your verdict shall be for such sum as will fairly and fully compensate the plaintiff for the damages sustained as a result of the** [assault; battery; assault and battery]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Tri-State Coach Corp. v. Walsh, 188 Va. 299, 309–10, 49 S.E.2d 363, 368 (1948)*; *S.H. Kress & Co. v. Musgrove, 153 Va. 348, 354–58, 149 S.E. 453, 454–56 (1929).*

### PRACTICE COMMENTARY

***Punitive Damages.*** If a claim for punitive damages is submitted to the jury, use Instructions No. 9.080, General Punitive Damages, 9.090, Definition of Common Law Actual Malice, and 4.040, Definition of Willful and Wanton Conduct. Proof of a common law intentional tort permits an award of punitive damages. *Shaw v. Titan Corp., 255 Va. 535, 545, 498 S.E.2d 696, 701 (1998)* (common law cause of action for wrongful termination).

### *ALERTS:*

- Do not use this instruction without first reading the general damage instruction, Instruction No. 9.000, General Personal Injury and Property Damage and the Practice Commentary.

- The paragraph of the instruction concerning circumstances which make the injury more serious does not apply to an employer when respondeat superior is the only basis for the employer's liability unless the employer authorized or ratified the tort. *Tri-State Coach Corp., 188 Va. at 309, 49 S.E.2d at 368.*

- The jury must be instructed that it is the plaintiff's burden to prove compensatory damages. See Instruction No. 9.010, Reasonable Proof.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1 through 6.3

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.02, 23.04, 23.05, 25.03, 35.03

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, §§ 2.2, 2.33, 3.2, 13.4, 14.12

Kent Sinclair, VIRGINIA REMEDIES, Chapter 6

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1 through 31

# Chapter 37

# DEFAMATION



## Scope Note

**Instruction No. 37.000** Liability Issues (Public Figure/Defamatory *Per Se*)

**Instruction No. 37.010** Liability Issues (Public Figure/Not Defamatory *Per Se* or Private Figure/ Substantial Danger to Plaintiff's Reputation Not Apparent)

**Instruction No. 37.020** Liability Issues (Private Plaintiff/Danger to Plaintiff's Reputation Apparent)

**Instruction No. 37.030** Insulting Words

**Instruction No. 37.050** Privilege

**Instruction No. 37.060** Merchant: Probable Cause

**Instruction No. 37.090** Finding Instruction (for use with Instruction No. 37.000)

**Instruction No. 37.095** Finding Instruction (for use with Instruction No. 37.010)

**Instruction No. 37.097** Finding Instruction (for use with Instruction No. 37.020)

**Instruction No. 37.098** Finding Instruction (for use with Instruction No. 37.020)

**Instruction No. 37.100** Actual Damages

**Instruction No. 37.105** Presumed Damages

**Instruction No. 37.107** Presumed Damages (Public Concern)

**Instruction No. 37.110** Punitive Damages (Defamatory *Per Se*)

**Instruction No. 37.111** Punitive Damages (Not Defamatory *Per Se*)

**Instruction No. 37.120** Mitigation of Damages: Actions Against Newspapers, Magazines, or Periodicals

**Instruction No. 37.130** Mitigation of Damages: Apology

# SCOPE NOTE

The elements of defamation are (1) publication of (2) an actionable statement with (3) the requisite degree of fault.

**Actionable Statement.** It is not sufficient just that the statement be false. To be actionable, the statement must be both false and have a defamatory meaning. *Jordan v. Kollman, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005).* As a consequence of the falsity requirement, statements of opinion are generally not actionable. *Id. at 575–76, 206.*

A statement made by inference, implication, or insinuation can have defamatory meaning that is "not apparent on its face" as long as the statement may actually defame the plaintiff. See *Pendleton v. Newsome, 290 Va. 162, 172, 772 S.E.2d 759, 763 (2015).* The alleged defamatory implication, however, must be reasonably drawn from the words actually used. *Webb v. Virginian-Pilot Media Co., LLC, 287 Va. 84, 89, 752 S.E.2d 808, 811 (2014).*

Additionally, a statement falsely attributed to a plaintiff that damages his reputation is actionable as defamation regardless of the statement's truth or falsity. *Tharpe v. Saunders, 285 Va. 476, 483–84, 737 S.E.2d 890, 894 (2013).*

Whether a statement is actionable is a matter of law to be determined by the court. *Handberg v. Goldberg, 297 Va. 660, 667, 831 S.E.2d 700, 706 (2019)*; *Sroufe v. Waldron, 297 Va. 396, 398, 829 S.E.2d 262, 263 (2019)*; *Jordan, 269 Va. at 576, 612 S.E.2d at 206–07.* See also *Pendleton v. Newsome, 290 Va. 162, 172, 772 S.E.2d 759, 763 (2015)* (holding that defamatory meaning is a question of law, but whether the circumstances were reasonably sufficient to convey the alleged defamatory meaning, and whether the plaintiff was actually defamed thereby, remain issues to be resolved by the fact-finder at trial); *Schaecher v. Bouffault, 290 Va. 83, 94, 772 S.E.2d 589, 595 (2015)* ("[A] court must decide as a threshold matter of law whether a statement is reasonably capable of defamatory meaning before allowing the matter to be presented to a finder of fact."); *Webb v. Virginian-Pilot Media Co., 287 Va. 84, 90–91, 752 S.E.2d 808, 811–12 (2014)* ("resolving the question of defamatory meaning is an essential threshold, gatekeeping function of a court before a case is submitted to the jury.").

**Defamation *per se*.** To be defamatory *per se*, the statement must:

(1) Impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished;

(2) Impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society;

(3) Impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; or

(4) Prejudice such person in his or her profession or trade.

*Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 713, 636 S.E.2d 447, 449–50 (2006)*; *Fleming v. Moore, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981).*

Whether an alleged defamatory statement is defamatory *per se* is a matter of law to

be determined by the court. See *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 148, 334 S.E.2d 846, 850 (1985).*

The following sections will outline: (1) how to determine the status of a plaintiff, i.e., is the plaintiff a public official, a public figure, a private figure dealing with a matter of public concern (limited-purpose public figure), or a private individual; (2) what standards of fault are required to find liability given the plaintiff's status; and (3) who bears the burden of proof.



**Applicable Fault Standard.** The standard of liability is not characterized in terms of intent, but instead in terms of degree of fault. *Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974)*; ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"); see also *Gazette, Inc. v. Harris, 229 Va. 1, 10–15, 325 S.E. 2d 713, 721–25 (1985)* (discussing *Gertz* and standard of "fault" under Virginia law for damages in a defamation case); *Newspaper Publ'g Corp. v. Burke, 216 Va. 800, 803–04, 224 S.E.2d 132, 135 (1976)* (jury instruction based upon the common law principle of presumed damages was erroneous because it allowed the jury to impose liability upon a newspaper "without fault"). As an analytical matter, to determine the appropriate standard of fault to apply in any defamation action, the following questions must be answered:

(1) What is the status of the plaintiff?

(2) Given the status of the plaintiff, what is the fault standard required to find liability—is it negligence or actual malice?

(3) Given that standard, which party has the burden of proof? A chart laying out the potential answers to each of these questions is provided *infra*.

These questions are matters of law that must be decided by the court. *Rosenblatt v. Baer, 383 U.S. 75, 88 (1966)* (remarking that "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.' ").

### (1) Status of the Plaintiff—Public or Private?

The law of defamation recognizes four different types of plaintiff: (1) public officials; (2) public figures; (3) limited-purpose public figures; and (4) private individuals.

**Public Officials.** "It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello v. Chicago, 337 U.S. 1, 4 (1949)*; *De Jonge v. Oregon, 299 U.S. 353, 365 (1937).* A plurality of the U.S. Supreme Court has held that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. *Rosenblatt, 383 U.S. at 85.*

The U.S. Supreme Court has not determined "how far down into the lower ranks of government employees the 'public official' designation would extend." *New York Times Co. v. Sullivan, 376 U.S. 254, 283 n.23 (1964).* However, the Court has held that protection for publications about "public officials" extends to publications regarding candidates for office. *Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971).* Consistent with *Monitor Patriot Co.*, the Supreme Court of Virginia has required proof

of *New York Times* malice even in cases where a political candidate, who is yet to be elected, asserts a claim for damages allegedly caused by defamatory statements touching on his fitness for office. *Jackson v. Hartig, 274 Va. 219, 228, 645 S.E.2d 303, 308 (2007).* Also, the Supreme Court of Virginia has identified the following as key factors for determining when public sector employees qualify as public officials: (i) the employee's access to the media and the opportunity to answer false charges, (ii) the employee's actual or perceived responsibility for or control over the conduct of governmental affairs, and (iii) where the alleged defamatory statement relates to a public issue, the employee's ability to influence the resolution of that issue. *Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 284–87, 362 S.E.2d 32, 35–37 (1987).* See also *Horne v. WTVR, LLC, 893 F.3d 201, 206–10 (4th Cir. 2018)* (thorough analysis of when a public employee qualifies as a public official).

For examples of other courts' rulings on who is a "public official," see *Coliniatis v. Dimas, 965 F. Supp. 511, 517 (S.D.N.Y. 1997)* (former director of operations for North and South America for an airline owned by the Greek government); *Rogers v. Cassidy, 946 S.W.2d 439, 445 (Tex. Ct. App. 1997)* (city attorney who was paid on retainer, attended up to six monthly meetings of city commissioners and civil service commission, and had contact with public through public meetings and sending notices of court hearings to citizens); *Krueger v. Austad, 545 N.W.2d 205, 211–12 (S.D. 1996)* (state senator seeking reelection); *Demby v. English, 667 So. 2d 350, 354–55 (Fla. Dist. Ct. App. 1995)* (director of a county animal control); *Lewis v. Oliver, 873 P.2d 668, 675 (Ariz. Ct. App. 1993)* (FAA safety inspector); *Peterfish v. Frantz, 424 N.W.2d 25, 30 (Mich. Ct. App. 1988)* (contract compliance officer); *Barnett v. Mobile County Personnel Bd., 536 So.2d 46, 54 (Ala. 1988)* (town clerk); *Moorhead v. Millin, 542 F. Supp. 614, 618 (D. V.I. 1982)* (appointed Director of the Division of Utilities and Sanitation of the Virgin Islands Department of Public Works); *Clawson v. Longview Publ'g Co., 589 P.2d 1223, 1229 (Wash. 1979)* (administrator of county motor pool); *Press, Inc. v. Verran, 569 S.W.2d 435, 443 (Tenn. 1978)* (junior social worker in county office); *Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1102 (Okla. 1978)* (grade school wrestling coach); *Glover v. Herald Co., 549 S.W.2d 858, 861 (Mo. 1977)* (alderman); *Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977)* (deputy sheriff); *Johnson v. Capital City Press, 346 So. 2d 819, 821 (La. Ct. App. 1977)* (member of highway board); *Sierra Breeze v. Superior Ct. of El Dorado County, 149 Cal. Rptr. 914, 916–18 (Cal. Ct. App. 1978)* (county supervisor); *Tague v. Citizens for Law & Order, Inc., 142 Cal. Rptr. 689, 690 (Cal. Sup. Ct. 1977)* (assistant public defender); *Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1977)* (federal drug enforcement agents). For more cases, see Danny R. Veilleux, *Who is a "Public Official" for Purposes of Defamation Action*, 44 A.L.R. 5th 193 (1996).

For cases holding that the plaintiff is not a "public official", see *Michaelis v. CBS, Inc., 119 F.3d 697, 702 (8th Cir. 1997)* (private physician who also served as coroner for a Minnesota county, and who, at request of coroner for another county, performed autopsy on person who died in second county); *Sparagon v. Native Am. Publishers, 542 N.W.2d 125, 135 (S.D. 1996)* (chief of podiatry at a Veterans Administration Medical Center); *Crane v. Arizona Republic, 972 F.2d 1511, 1524–25 (9th Cir. 1992)* (a private lawyer and former head of the Justice Department's Los Angeles Organized Crime and Racketeering Strike Force); *Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 582–84 (W. Va. 1992)* (appointed member of the State Racing Commission, a municipal judge, and a member of the State Bar's Board of Governors and subsequently its vice

president); *Kassel v. Gannett Co., 875 F.2d 935, 940–41 (1st Cir. 1989)* (clinical psychologist at a Veterans' Administration hospital); *Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 286–87, 362 S.E.2d 32, 37 (1987)* (public school teacher); *Jenoff v. Hearst Corp., 453 F. Supp. 541, 543–44 (D. Md. 1978)* (undercover police informant); *Forrest v. Lynch, 347 So. 2d 1255, 1258 (La. Ct. App. 1977)* (private consulting engineer hired by architect for state school building); *Gertz v. Robert Welch, Inc., 418 U.S. 323, 351–52 (1974)* (private attorney who represented the murder victim's family in a civil suit against a police officer convicted of murder). For more cases, see Danny R. Veilleux, *Who is a "Public Official" for Purposes of Defamation Action*, 44 A.L.R. 5th 193 (1996).



**Public Figures.** The Supreme Court has made a distinction between a person carrying out official government business as a public official and a person who has gained prominence as a public figure without a relation to official government business:

> For the most part those who attain this status [of a public figure] have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

*Gertz, 418 U.S. at 345*. See also *Fleming v. Moore, 221 Va. 884, 891, 275 S.E.2d 632, 637 (1981)*. The Court has expanded the definition of a public figure to include someone who "through no purposeful action of his own" has become a figure in the public's eye but notes that "instances of truly involuntary public figures must be exceedingly rare." *Gertz, 418 U.S. at 345*.

For examples of other courts' rulings on who is a "public figure," see *Freedlander v. Eden Broadcasting, Inc., 734 F. Supp. 221, 229–30 (E.D. Va. 1990)* (radio parody of local banker accused of financial improprieties); *Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 862 (5th Cir. 1978)* (subject of numerous articles and reports because of activities concerning organized crime); *Church of Scientology of Cal. v. Cazares, 455 F. Supp. 420, 423 (M.D. Fla. 1978)* (Church of Scientology); *Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977)* (sons of Julius and Ethel Rosenberg); *Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977)* (large publicly held corporation with immense assets that was generally in public eye); *Hoffman v. Washington Post Co., 433 F. Supp. 600, 604 (D.D.C. 1977)* (weightlifting coach, author of many books, lecturer, publisher of magazine); *Ray v. Time, Inc., 452 F. Supp. 618, 621 (W.D. Tenn. 1976)* (James Earl Ray); *James v. Gannett Co., 353 N.E.2d 834, 839 (N.Y. 1976)* (entertainer, belly dancer). For more cases, see Tracy A. Bateman, *Who is a "Public Figure" for Purposes of Defamation Action*, 19 A.L.R. 5th 1 (1994).

For cases holding that the plaintiff is not a "public figure," see *Furgason v. Clausen, 785 P.2d 242, 249 (N.M. Ct. App. 1989)* (a bar owner appointed to serve on a mayoral advisory committee); *Jacobson v. Rochester Communications Corp., 410 N.W.2d 830 (Minn. 1987)* (a bar owner who had stood trial for arson); *Vern Sims Ford, Inc. v. Hagel, 713 P.2d 736, 739 (Wash. Ct. App. 1986)* (an automobile dealership, its manager, and a salesman); *Fleming, 221 Va. at 892, 275 S.E.2d at 637* (college professor on the state payroll); *Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167–68 (1979)* (nephew

of two persons pleading guilty of espionage who was guilty of criminal contempt for ignoring grand jury subpoena); *Hutchinson v. Proxmire, 443 U.S. 111, 135–36 (1979)* (scientist and research director who received a federal research grant); *Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976)* (socialite, party to a sensational divorce trial, who had held a news conference). For more cases, see Tracy A. Bateman, *Who is a "Public Figure" for Purposes of Defamation Action*, 19 A.L.R. 5th 1 (1994).

**Limited-Purpose Public Figures.** A limited-purpose public figure is essentially one who has assumed a "role of public prominence in the broad question of concern." *Hutchinson, 443 U.S. at 135.* The limited-purpose public figure is an analytical hybrid between a public figure and a private individual. The Court in *Gertz* explained that a person could be a limited-purpose public figure, which is a person who is not a public official or a public figure, by having the status of a private individual at the forefront of a particular issue of public concern. *Gertz, 418 U.S. at 351.* If the matter is of private concern, the plaintiff is a private individual.

Matters of public concern have been described as involving the fundamental policies of our nation in assuring "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985).* However, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Reader's Digest Ass'n., Inc., 443 U.S. 157, 167 (1979).*

In order to draw a distinction between the classes of plaintiffs, the Supreme Court of Virginia has stated that the courts must "focus upon the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.' " *Fleming, 221 Va. at 892, 275 S.E.2d at 637 (quoting Gertz, 418 U.S. at 352).* See also *Time, 424 U.S. at 454–55* (plaintiff who went to court to vindicate private rights does not become a public figure).

The Fourth Circuit set forth five requirements that the defamation defendant must prove before a court can properly hold that the plaintiff is a limited-purpose public figure:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

*Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994)*; see also *Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982).*

For cases holding that the plaintiff is a "limited-purpose public figure," see *Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 869–71 (W.D. Va. 2016)* (a plaintiff who for years was involved in the public debate about a university's response to sexual assault allegations qualified as a limited-purpose public figure on that issue); *Hatfill v. N.Y. Times Co., 532 F.3d 312, 319–24 (4th Cir. 2008)* (a biodefense research scientist specializing in threats from bioterrorism and government preparedness, who was a frequent instructor of government agencies, arranged meetings with journalists, and

appeared on television and publications); *Capuano v. Outlet Co., 579 A.2d 469, 473–74 (R.I. 1990)* (owners and operators of waste disposal companies alleged to be under the direction of organized crime); *J. & C., Inc. v. Combined Communs. Corp. of Kentucky, 1987 Ky. App. LEXIS 620 (Ky. Ct. App.)* (participants in a joint venture involved in removing sludge from sewage treatment plants and mixing it with other ingredients to be used to reclaim or revegetate strip-mined lands, were limited-purpose public figures for the purpose of their defamation action against a television station which telecast a series of news stories regarding this project); *Tavoulareas v. Piro, 817 F.2d 762, 775 (D.C. Cir. 1987)* (president of a prominent company in an industry undergoing controversial reforms); *Prager v. American Broadcasting Co., 569 F. Supp. 1229, 1237 (D.N.J. 1983)* (sales representative, account executive and district manager, was a limited public figure for purposes of a defamation action arising out of a television broadcast relating to a corporation under grand jury investigation); *Hammerhead Enters., Inc. v. Brezenoff, 551 F. Supp. 1360, 1368 (S.D.N.Y. 1982)* (manufacturers and marketers of a board game that "spoofed" the welfare system, were limited public figures for purposes of a defamation action against a social services official who wrote a letter to stores criticizing the game); *Cloyd v. Press, Inc., 629 S.W.2d 24, 25–26 (Tenn. App. 1981)* (jeweler who filed petitions requiring a referendum to be held on the purchase of property by the town and purchased advertisements in the local newspaper opposing the purchase and urging voters to vote "no" in the referendum, was a limited public figure for purposes of his defamation action against a newspaper and authors of two articles which stated that plaintiff violated election laws by failing to file a financial report).



For cases holding the plaintiff is not a "limited-purpose public figure," see *New Franklin Enterprises v. Sabo, 480 N.W.2d 326, 328–29 (Mich. Ct. App. 1991)* (amusement park operators who were criticized by candidates for public office during the course of the campaign); *Rety v. Green, 546 So. 2d 410, 425 (Fla. Dist. Ct. App. 1989)* (restaurant owner who allegedly made anti-Semitic statements in a private conversation); and *Pesta v. CBS, Inc., 686 F. Supp. 166, 169–70 (E.D. Mich. 1988)* (physician who allegedly misdiagnosed a patient).

For more cases on the issue of public figure status, see Tracy A. Bateman, *Who is a "Public Figure" for Purposes of Defamation Action*, 19 A.L.R. 5th 1 (1994).

**Private Individuals.** A private individual is identified as one who does not fit within the categories of a public official, public figure, or limited-purpose public figure.

The U.S. Supreme Court has identified a private individual as one who has:

> relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

*Gertz, 418 U.S. at 345.*

**Corporations.** A corporation or other entity may be a plaintiff in a defamation action. The court determines the status of such plaintiff as being one of the above discussed categories. See *Smithfield Foods, Inc. v. United Food & Commercial. Workers Int'l Union, 585 F. Supp. 2d 815, 818 n.1 (E.D. Va. 2008)*; *Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 686 (4th Cir. 1989)*; *Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518,*

*521 (4th Cir. 1980)*. Only the corporation may recover damages for defamation to the corporation. A natural person may not recover. *Landmark Communications, Inc. v. Macione, 230 Va. 137, 140, 334 S.E.2d 587, 589 (1985)*.

**(2) Liability Standard**

In order to recover in a suit for defamation, it must be proven that the injurious statements were false. The falsity of a statement must have a corresponding "sting" to be actionable, and falsity and injury to reputation must coincide. *Schaecher v. Bouffault, 290 Va. 83, 91–92, 772 S.E.2d 589, 594 (2015)*; *Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993)*. A statement falsely attributed to plaintiff, and which damages his reputation, is actionable as defamation regardless of its truth or falsity. *Tharpe v. Saunders, 285 Va. 476, 482–83, 737 S.E.2d 890, 894 (2013)*. The Supreme Court has dealt with the appropriate liability standard for each category of plaintiff.

**Public Official.** In *New York Times*, the Court held that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " *376 U.S. at 279–80*. This is referred to as *New York Times* malice. It requires that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82–83 (1967) (quoting New York Times, 376 U.S. at 279–80)*. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)*. Instead, the evidence must establish that the defendant had a high degree of awareness of probable falsity. *Id.*; see also *Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)* (adopting the "high degree of awareness" test for reckless disregard for the truth); *Jordan, 269 Va. at 580, 612 S.E.2d at 209* (citing *Harte-Hanks* and *Shenandoah* as authority for application of "high degree of awareness" standard); *Garrison v. Louisiana, 379 U.S. 64, 73–74 (1964)* ("[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood . . . . [E]ven if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.")

For any public official to prevail, a showing of *New York Times* malice is required.

**Public Figures.** In *Curtis Publishing Co. v. Butts, 388 U.S. 130, 155, 164, 172–73 (1967)*, a majority of the Supreme Court applied the *New York Times* malice standard to public figures. See also *Milkovich v. Lorain Journal Co., 497 U.S. 1, 14–15 (1990)*.

**Limited-Purpose Public Figures.** The *New York Times* malice standard also applies to limited-purpose public figures. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246–47 (1986)*. See also *Hatfill v. N.Y. Times Co., 532 F.3d 312, 318 (4th Cir. 2008)* ("in contrast to a public official or an all-purpose public figure, either of whom must always meet the actual malice standard, a 'limited-purpose public figure,' . . . must show actual malice only when alleging defamation with regard to the particular controversy into which he has inserted himself.").

**Private Individuals.** The standard for recovery in Virginia is negligence. *Gazette, Inc. v. Harris, 229 Va. 1, 15, 325 S.E.2d 713, at 724–25 (1985)* ("in an action brought by a private individual to recover actual, compensatory damages for a defamatory

publication, the plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based"). The Supreme Court of Virginia has generally declined to extend a more stringent standard upon private individuals beyond simple negligence. *Fleming, 221 Va. at 891–92, 275 S.E.2d at 637.*

The only exception is for statements that do not make substantial danger to reputation apparent. In such cases, the plaintiff must prove *New York Times* malice. *Gazette, Inc., 229 Va. at 15, 325 S.E.2d at 725.*



### (3) Burden and Standard of Proof

Under modern defamation law, the plaintiff has the burden to prove all the required elements of the tort in order to recover. *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 149–52, 334 S.E.2d 846, 851–55 (1985).* The burden and standard of proof varies depending upon the status of the plaintiff. *Gertz, 418 U.S. at 342–44.*

**Public Official, Public Figures, and Limited-Purpose Public Figures.** In any case involving a plaintiff who is a public official, public figure, or limited-purpose public figure, the plaintiff bears the burden of proof that the statement was made with *New York Times* malice. *Gertz, 418 U.S. at 333–39*; *Gazette, Inc., 229 Va. at 10, 325 S.E.2d at 722.*

Further, the plaintiff's evidence must establish *New York Times* malice by clear and convincing evidence. *New York Times, 376 U.S. at 285–286*; *Gazette, Inc., 229 Va. at 10, 325 S.E.2d at 722.*

**Private Individuals.** In cases where the plaintiff is a private individual, the plaintiff has the burden of proving falsity and negligence by a preponderance of the evidence. *Gazette, Inc., 229 Va. at 15, 325 S.E.2d at 724–25.*

### (4) Summary

The table below is a brief summary of the standards set forth in the section above:

| What is the status of the Plaintiff? | What is the Liability/ Fault Standard? | Who has the burden of proof? |
|---|---|---|
| Public Official See *New York Times v. Sullivan, 376 U.S. 254 (1964).* | *New York Times* malice. | Plaintiff by clear and convincing evidence. |
| Public Figure See *Curtis Pub. Co. v. Butts, 388 U.S. 130, 164 (1967).* | *New York Times* malice. | Plaintiff by clear and convincing evidence. |

| | | |
|---|---|---|
| Ltd Purpose Public Figure<br>See *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).* | *New York Times* malice. | Plaintiff by clear and convincing evidence. |
| Private Individual<br>See *Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).* | Negligence, except that *New York Times* malice is required where substantial danger to reputation is not apparent. | Plaintiff by a preponderance of the evidence, except clear and convincing evidence of *New York Times* malice when substantial danger to reputation not apparent. |

## DAMAGES

### 1. Actual (or Compensatory) Damages

**General and Special Damages.** The terms "actual damages" and "compensatory damages" are synonymous and include all damages other than punitive damages. *News Leader Co. v. Kocen, 173 Va. 95, 108, 3 S.E.2d 385, 391 (1939).* They generally consist of (a) the value of damage to reputation, mental anguish, humiliation, and embarrassment, whose monetary value is not subject to proof with mathematical precision, but is established by some evidence, sometimes known as "general damages" and (b) quantifiable, out-of-pocket monetary loss or expense that is measurable in the same manner as damages in other tort actions, e.g., medical expenses, lost income, lost profits, etc., sometimes identified as "special damages." *Fleming v. Moore, 221 Va. 884, 894, 275 S.E.2d 632, 638–39 (1981); Slaughter v. Valleydale Packers, Inc., 198 Va. 339, 346, 94 S.E.2d 260, 266 (1956).*

Actual damages, both general and special, must be established by proof of actual injury in order to recover in a Virginia defamation case, unless the plaintiff is relieved of such proof by the *per se* rule. *Fleming v. Moore, 221 Va. at 894, 275 S.E.2d at 638–39.* Further, the measure of actual damages is largely a matter of jury discretion that must bear a "reasonable relation to the damages sustained." *Gazette, Inc. v. Harris, 229 Va. 1, 48, 325 S.E.2d 713, 745 (1985).*

**Recovery Requiring Malice for Public Officials or Public Figures.** Any public official, public figure, or private figure plaintiff who successfully establishes liability on the part of a defendant may recover actual damages for such injuries. However, no public official or public figure can receive actual damages unless they have first proven malice as to the underlying claim under the *New York Times* fault standard. *Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).*

Va. Code Ann. § 8.01-221.1 provides that "damages for lost profits of a new or unestablished business may be recoverable upon proper proof," and are recoverable in defamation actions.

### 2. Presumed Damages for *Per Se* Defamation

***Per Se* Defamation Not Involving Matters of Public Concern.** In an action brought by a private figure plaintiff (individual or business) "for defamatory words involving no

matters of public concern, if the published words are determined by the trial judge to be actionable *per se* at common law, compensatory damages for injury to reputation, humiliation, and embarrassment are presumed." *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 151, 334 S.E.2d 846, 852 (1985).* The *per se* rule, discussed under the heading **Defamation *per se*** at the beginning of this Scope Note, identifies specific categories of defamatory statements that are inherently injurious to the plaintiff's reputational interest. In such cases, injury to personal and business reputation, emotional distress, humiliation, embarrassment, and the like is presumed and may be awarded without the introduction of evidence proving such damages. "A plaintiff who proves the publication of words actionable *per se* is simply relieved of the necessity of proving the quantum of his damages for injury to reputation, humiliation and embarrassment." *Great Coastal Express, Inc. 230 Va. at 152, 334 S.E.2d at 853*; see also *Poulston v. Rock, 251 Va. 254, 260–61, 467 S.E.2d 479, 483 (1996).* An award of presumed damages may be "substantial," even in the absence of any actual damages. *Poulston, 251 Va. at 261, 467 S.E.2d at 483.*



***Per Se* Defamation Involving Matters of Public Concern; Malice Requirement.** Where a private figure plaintiff alleges defamation *per se* involving a matter of public concern, presumed damages cannot be awarded absent proof of malice as to the underlying claim under the *New York Times* fault standard. *WJLA-TV v. Levin, 264 Va. 140, 155, 564 S.E.2d 383, 391–92 (2002)*; *Great Coastal Express, Inc. 230 Va. at 150–51, 334 S.E.2d at 852.* "In defamation actions based on statements regarding matters of public concern, actual [*New York Times*] malice must be proved before presumed or punitive damages can be awarded." *Shenandoah Pub. House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993).*

### 3. Punitive Damages

Where actual damages have been proven, a plaintiff may recover punitive damages. *Fleming, 221 Va. at 893–94, 275 S.E.2d at 638.* However, in a *per se* defamation case, punitive damages may be awarded without proof of actual damages provided the plaintiff proves by clear and convincing evidence the *New York Times* fault standard of actual malice. *Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976).* Punitive damages "should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required; otherwise, the award on its face indicates prejudice or partiality." *Gazette, Inc., 229 Va. at 51, 325 S.E.2d at 747.* No plaintiff may recover punitive damages without proof by clear and convincing evidence of malice as to the underlying claim under the *New York Times* fault standard. *Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)*; *Jordan v. Kollman, 269 Va. 569, 577, 612 S.E.2d 203, 207 (2005)* ("To recover punitive damages, all defamation plaintiffs must show actual malice.").

### 4. Mitigation of Damages

In Virginia there are two separate code sections dealing specifically with mitigation of damages in a defamation action. Va. Code Ann. § 8.01-48 provides that publishers, owners, editors, and employees of a periodical may introduce evidence of reasonable reliance, good faith, a prior publication elsewhere of similar purport, or an apology or retraction made with reasonable promptness and fairness, in mitigation of actual, presumed and punitive damages. However, such evidence may not be considered in mitigation of any out-of-pocket losses actually incurred by the plaintiff.

Va. Code Ann. § 8.01-46 allows an apology made by the defendant to the plaintiff concerning the defamatory statement to be introduced in mitigation of the plaintiff's damages. An apology made under the statute must be made before the commencement of the action, or where the defendant had no opportunity of making or offering an apology before commencement of the case, then as soon after commencement as the defendant has the opportunity of making an apology. *James v. Powell, 154 Va. 96, 118, 152 S.E. 539, 547 (1930).*

## DEFENSES IN DEFAMATION CASES

**Opinion.** "It is firmly established that pure expressions of opinion are protected by both the First Amendment to the Federal Constitution and Article I, Section 12 of the Constitution of Virginia, and therefore, cannot form the basis of a defamation action." *Williams v. Garraghty, 249 Va. 224, 233, 455 S.E.2d 209, 215 (1995).* The United States Supreme Court has stated, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. . . . 'error of opinion may be tolerated where reason is left free to combat it.' " *Gertz, 418 U.S. at 340 n.8* (*quoting* Thomas Jefferson's First Inaugural Address).

Generally, the law in Virginia is that "speech which does not contain a provably false factual connotation, or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." *Yeagle v. Collegiate Times, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998).* Stated another way, statements that are capable of being proven true or false are not opinion and thus could possibly support a cause of action for defamation. *Tronfeld v. Nationwide Mutual Ins. Co., 272 Va. 709, 716, 636 S.E.2d 447, 451 (2006)*; see also *Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 133, 575 S.E.2d 858, 861–62 (2003).*

A statement falsely attributed to plaintiff, which damages his reputation, is actionable as defamation regardless of its truth or falsity. *Tharpe, 285 Va.at 483–84, 737 S.E.2d at 895.*

The United States Supreme Court "has specifically declined to hold that statements of opinion are categorically excluded as the basis for a common law defamation cause of action." *Yeagle, 255 Va. at 295 n.1, 497 S.E.2d at 137 n.1*; *Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–21 (1990).* In establishing the appropriate standards, the Court has stated:

> where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz.*

*Milkovich, 497 U.S. at 20–21.* While simply couching statements in terms of opinion does not dispel defamatory factual implications, reciting the facts on which the speaker's rationale is based usually makes the statement one of opinion. *Padula-Wilson v. Landry, 298 Va. 565, 580–81, 841 S.E.2d 864, 872–73 (2020)* (behavioral health professional's expressions of "concerns" about plaintiff's behavior, or whether plaintiff's behavior or statements were "appropriate," "inappropriate," or "negative," were

relative in nature, dependent on the speaker's viewpoint, and merely expressions of opinion); *Schaecher v. Bouffault, 290 Va. 83, 104–06, 772 S.E.2d 589, 600–601 (2015)*; *Biospherics, Inc. v. Forbes, 151 F.3d 180, 184–85 (4th Cir. 1998)* ("opinions fully disclosing their factual bases constitute a subjective view and are not actionable").

**Privileges.** Virginia recognizes both qualified and absolute privileges as immunity from liability for defamation that otherwise would be actionable. *Aylor v. Gibbs, 143 Va. 644, 648, 129 S.E. 696, 697 (1925)*. Whether a privilege exists is a matter of law. Thus, it is for the court to determine whether a privilege exists, whether it is qualified or absolute, and so to instruct the jury. *Id.*; *Great Coastal Express, Inc., 230 Va. at 153, 334 S.E. 2d at 853*.



**Qualified Privileges.** "A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty." *Id.* (quoting *Taylor v. Grace, 166 Va. 138, 144, 184 S.E. 211, 213 (1936)*).

For example, defamatory statements communicated by a peer review board to the board of visitors of a university were entitled to qualified privilege. *Larimore v. Blaylock, 259 Va. 568, 576, 528 S.E.2d 119, 123 (2000)*.

Good faith is not a factor in the determination of whether a qualified privilege exists. *Cashion v. Smith, 286 Va. 327, 338, 749 S.E.2d 526, 532 (2013)* (holding good faith is a question of fact affecting whether a qualified privilege has been *lost or abused*, not a question of law affecting whether a privilege has *attached*).

Once a qualified privilege has attached to a communication, the plaintiff has the burden to prove, by clear and convincing evidence, that the privilege has been lost or abused. *Cashion, 286 Va. at 338, 749 S.E.2d at 532*. There are several ways to defeat the privilege. A non-exhaustive list of elements that can defeat the privilege include a showing that (1) the statements were made with knowledge that they were false or with reckless disregard for their truth; (2) the statements were communicated to third parties who have no duty or interest in the subject matter; (3) the statements were motivated by personal spite or ill will; (4) the statements included strong or violent language disproportionate to the occasion; or (5) the statements were not made in good faith. *Id. at 339*.

**Absolute Privilege and Judicial Immunity.** False, misleading, malicious, or defamatory statements made in the course of judicial proceedings, so long as they are pertinent and relevant to the subject matter of the proceeding, are absolutely privileged. *Lockheed Information Mgmt. Systems Co., Inc. v. Maximus, Inc., 259 Va. 92, 101, 524 S.E. 2d 420, 424–25 (2000)*; *Donohoe Construction Co. v. Mt. Vernon Associates, 235 Va. 531, 537–38, 369 S.E.2d 857, 860–61 (1988)*; *Massey v. Jones, 182 Va. 200, 204, 28 S.E.2d 623, 626 (1944)*; *Penick v. Ratcliffe, 149 Va. 618, 627–32, 140 S.E. 664, 667–69 (1927)*. Judicial proceedings have been defined broadly to include quasi-judicial proceedings and are "not restricted to trials of civil actions or indictments, but . . . [include] every proceeding before a competent court or magistrate in the due course of law or the administration of justice which is to result in any determination or action of such court or officer." *Darnell v. Davis, 190 Va. 701, 707, 58 S.E.2d 68, 71 (1950)*. The absolute privilege has been extended to administrative and regulatory proceedings that afford safeguards such as "the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence." *Lockheed, 259 Va. at 101, 524*

*S.E.2d at 424* (statements made in bid protest proceeding not subject to absolute privilege); *Bryant-Shannon v. Hampton Roads Comm. Action Prog., Inc., 299 Va. 579, 591, 856 S.E.2d 575, 581 (2021)* (statements made during Virginia Employment Comm. proceedings absolutely privileged); *Donohoe, 235 Va. at 538–39, 369 S.E.2d at 861* (the filing of a memorandum of mechanic's lien as a prerequisite to a lien enforcement action constitutes a judicial proceeding subject to the privilege); *Elder v. Holland, 208 Va. 15, 21–22, 155 S.E.2d 369, 373–75 (1967)* (testimony during internal personnel hearing conducted by police department not absolutely privileged); *Darnell, 190 Va. at 708, 58 S.E.2d at 71* (allegedly defamatory written dismissal of trespass warrant filed with justice of the peace subject to absolute privilege). The privilege is available also to the original source of defamatory statements that are thereafter republished by a third party in a judicial proceeding. *Watt v. McKelvie, 219 Va. 645, 650–51, 248 S.E.2d 826, 829 (1978).*

The privilege may also apply under certain circumstances to communications made before the filing of an action if (1) the statement was made preliminary to a proposed proceeding; (2) the statement was related to a proceeding contemplated in good faith and under serious consideration; and (3) the communication was disclosed to interested persons. *Mansfield v. Bernabei, 284 Va. 116, 125, 727 S.E.2d 69, 75 (2012).* The privilege extends beyond the actual courtroom to statements published in a memorandum of mechanic's lien and depositions, if made in an applicable proceeding, and need only be relevant and pertinent to the case to be protected by the privilege. *Donohoe, 235 Va. at 538–39, 369 S.E.2d at 861–62*; *Watt, 219 Va. at 651, 248 S.E.2d at 829.* However, the privilege does not ordinarily extend to mere potential litigation where no claim or proceeding is pending before a court or quasi-judicial body. *Lindeman v. Lesnick, 268 Va. 532, 537–38, 604 S.E.2d 55, 58 (2004).*

Under Virginia law, judges are entitled to absolute immunity from civil liability, even when they act maliciously, corruptly, or in excess of their jurisdiction. Judges can only be subject to civil liability when they act in clear absence of all jurisdiction. *Viers v. Baker, 298 Va. 553, 561, 841 S.E. 2d 857, 861 (2020)*; *Harlow v. Clatterbuck, 230 Va. 490, 493, 339 S.E.2d 181, 184 (1986).* While absolute judicial immunity is limited to judges, quasi-judicial immunity may extend to other non-judicial public officials who were (1) performing judicial functions, (2) acting within their jurisdiction, and (3) acting in good faith. *Viers, 298 Va. at 561, 841 S.E.2d at 862*; *Harlow, 230 Va. at 494, 339 S.E.2d at 184.* See generally *Harlow, 230 Va. at 494–95, 339 S.E.2d at 184–85* (quasi-judicial immunity available to Department of Corrections aftercare supervisor, rehabilitative counselor, and learning center supervisor making release determination for committed juvenile); *Andrews v. Ring, 266 Va. 311, 321, 585 S.E.2d. 780, 785 (2003)* (quasi-judicial immunity attaches to a prosecutor's activities involved in the initiation of criminal process such as preparation of a grand jury indictment, direction to law enforcement officer to obtain a warrant or summons, or advice to a law enforcement officer regarding the sufficiency of probable cause to obtain a warrant or summons). However, in *Viers, 298 Va. at 562–63, 841 S.E.2d at 862–63*, the Supreme Court of Virginia held that quasi-judicial immunity did not apply to allegedly defamatory public statements made by a prosecutor explaining, and responding to public criticism regarding, his discharge of an administrative assistant. The statements lacked any plausible connection to a tenable pending or forthcoming criminal prosecution, they did not fall within the scope of the prosecutor's judicial duties, and they were not intimately associated with the judicial phase of the criminal process. *Id.*

If there is no dispute as to the circumstances under which the allegedly defamatory publication or statement was made, the determination of whether judicial or quasi-judicial immunity applies is for the court. *Penick, 149 Va. at 627, 140 S.E. at 667.*

**Merchant Privilege.** Va. Code Ann. § 8.01-226.9 states that a merchant is not civilly liable for slander if the merchant had probable cause to believe that a customer had shoplifted or willfully concealed merchandise at the time the merchant caused the customer's arrest.

The merchant has the burden to prove there was probable cause to arrest the plaintiff as an affirmative defense. *Tweedy v. J.C. Penney Co., 216 Va. 596, 600, 221 S.E.2d 152, 155 (1976).* Whether probable cause is proven depends upon whether the circumstances disclosed by the evidence were such as to justify an ordinarily prudent person in acting as the merchant acted. *F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973).*

This statute does not provide the merchant with absolute immunity. Immunity may be lost in circumstances in which a tort is committed in a willful, wanton or otherwise unreasonable or excessive manner. *Jury v. Giant, Inc., 254 Va. 235, 239, 491 S.E.2d 718, 720 (1997).*



## NOTE ON OTHER APPLICABLE PRINCIPLES

**Gatekeeping Function of Trial Court.** In Virginia, the categorization of an allegedly defamatory statement as fact or opinion is an issue of law for the court to decide. *Handberg, 297 Va. at 667, 831 S.E.2d at 706*; *Sroufe, 297 Va. at 398, 829 S.E.2d at 263*; *Government Micro Resources, Inc. v. Jackson, 271 Va. 29, 40, 624 S.E.2d 63, 69 (2006)*; *Jordan, 269 Va. at 576, 612 S.E.2d at 206–07*; *Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985).* An allegedly defamatory statement must be considered as a whole to determine whether it states a fact or a non-actionable opinion. *Government Micro Resources, Inc., 271 Va. at 40, 624 S.E.2d at 69 (2006); American Communications Network, Inc. v. Williams, 264 Va. 336, 341–42, 568 S.E. 2d 683, 686 (2002).* For a statement of fact to be actionable as defamation, it must have "the requisite defamatory 'sting' to one's reputation," which is also an issue for the trial court to decide as a matter of law. *Handberg, 297 Va. at 667, 671–72, 831 S.E.2d at 706, 708*; *Schaecher, 290 Va. at 92, 772 S.E.2d at 589.* The Virginia Supreme Court has repeatedly described this as "the trial court's gatekeeping function in a defamation action." *Handberg, 297 Va. at 672, 831 S.E.2d at 708*; *Sroufe, 297 Va. at 398, 401, 829 S.E.2d at 263, 265*; *Webb v. Virginian-Pilot Media Co., 287 Va. 84, 90, 752 S.E.2d 808, 811 (2014).*

**Trial Court Must Segregate Statements of Fact from Statements of Opinion.** As gatekeeper, the trial court's "essential" function is to ensure "that a defamation action only proceed upon statements which actually may defame a plaintiff." *Handberg, 297 Va. at 671, 831 S.E.2d at 708*; *Webb, 287 Va. at 90–91, 752 S.E.2d 808 at 812.* The trial court therefore is required to determine "on a case-by-case basis whether an unredacted document containing both actionable statements of fact and statements of mere opinion should be presented to the jury for purposes of providing context for the actionable statements of fact . . . or whether only the actionable statements of fact should be presented for the jury's consideration." *Handberg, 297 Va. at 672, 831 S.E.2d at 708.* See *Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 304–06, 641 S.E.2d 84, 91–92 (2007).*

**Specific Instructions Required as to Actionable and Non-Actionable Statements.** Once the trial court has segregated the actionable statements of opinion, whether in redacted or unredacted form, "the trial court must specifically instruct the jury as to the actionable factual statements that the jury can consider in determining whether the defendant defamed the plaintiff—as opposed to statements of mere opinion which cannot be a basis for a defamation claim." *Handberg, 297 Va. at 672, 831 S.E.2d at 708.* The failure to do so is reversible error. *Id., 297 Va. at 673, 831 S.E.2d at 709.*

**Contradictory Holding in *Richmond Newspapers, Inc., v. Lipscomb* Described as "Aberration".** In *Richmond Newspapers, Inc.*, the Virginia Supreme Court held that the trial judge had no duty to segregate potentially defamatory material from non-defamatory material in granting instructions to the jury. *Richmond Newspapers, Inc., 234 Va. at 297–98, 362 S.E.2d at 43.* The Court in *Handberg* described that holding as an "aberration." *Handberg, 297 Va. at 671, 831 S.E.2d at 708.* While not expressly overruled, the description of the holding in *Richmond Newspapers, Inc.* as inconsistent with prior and subsequent precedent suggests that *Richmond Newspapers, Inc.* should no longer be considered as authority on this proposition.

**Statute of limitations.** A cause of action for defamation arises upon the publication of a defamatory statement. *Weaver v. Beneficial Fin. Co., 199 Va. 196, 199–200, 98 S.E.2d 687, 690–91 (1957).* Every action for insulting words or defamation must be brought within one year after the cause of action accrues. Va. Code Ann. § 8.01-247.1. The Supreme Court has interpreted Va. Code Ann. § 8.01-247.1 to cause the statutory period to begin to run "when an injury is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy." *Jordan v. Shands, 255 Va. 492, 498, 500 S.E.2d 215, 218–19 (1998)*; *Westminster Inv. Corp. v. Lamps Unlimited, 237 Va. 543, 546, 379 S.E.2d 316, 317–18 (1989).*

Va. Code Ann. § 8.01-247.1 provides that if a publisher of actionable statements publishes anonymously or pseudonymously, an action may be filed under the section and the statute of limitations shall be tolled until the publisher's identity is discovered or should reasonably have been discovered.

**Labor disputes.** Labor disputes have been characterized as heated affairs and the language that is commonplace in labor disputes might well appear actionable *per se. Crawford v. United Steelworkers, 230 Va. 217, 229–35, 335 S.E.2d 828, 835–39 (1985).* However, the United States Supreme Court has stated in the setting of a labor dispute "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn v. United Plant Guard Workers, 383 U.S. 53, 63 (1966).* The ruling in *Linn* is consistent with Congress' intent to create freewheeling use of written and spoken word in labor disputes and to further promote the favored federal policy of "uninhibited, robust and wide-open debate in labor disputes." *Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 273 (1974).*

In the context of labor disputes, the Court has applied *New York Times* actual malice, by analogy, as the standard "to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the [National Labor Relations Act]." *Linn, 383 U.S. at 65.*

In light of the holding in *Linn*, the Court has broadened the application of the actual

malice standard to situations where the "defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Old Dominion Branch No. 496, 418 U.S. at 264, 279.*

**Church Governance.** When a plaintiff's defamation claim involves church governance and "cannot be considered in isolation, separate and apart from the church's decision to terminate his employment," civil courts lack jurisdiction to consider the claim. *Cha v. Korean Presbyterian Church, 262 Va. 604, 613–15, 553 S.E.2d 511, 516 (2001).* But see *Bowie v. Murphy, 271 Va. 126, 133–35, 624 S.E.2d 74, 78–80 (2006)* (holding that plaintiff's defamation claim against his pastor arising from the pastor's claim that plaintiff perpetrated an assault did not require the court to become involved in matters of church governance).



## NOTE ON INSULTING WORDS

The tort of insulting words is governed by Va. Code Ann. § 8.01-45, which states: "[a]ll words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." A plaintiff proceeding under the insulting words statute must aver that the words are actionable under the statute and must plead the exact words charged to have been used by the defendant. *Federal Land Bank v. Birchfield, 173 Va. 200, 215, 3 S.E.2d 405, 410 (1939)*; *Moss v. Harwood, 102 Va. 386, 391, 46 S.E. 385, 386 (1904)* (the pleading "must aver that the words, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent averment to denote that the words are actionable under the statute.").

**Same principles as defamation except for publication.** The law of insulting words is almost completely assimilated into the common law action for defamation. One exception is that an action for insulting words does not require a demonstration of publication. *Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 6–7, 82 S.E.2d 588, 591 (1954).* In addition, the insulting words statute does not require proof of falsity.

**Requires a showing of breach of the peace.** In Virginia, in order to sustain a cause of action for insulting words, the plaintiff must demonstrate that the words are insulting and "tend to violence and breach of the peace." Va. Code Ann. § 8.01-45. When determining whether the words give rise to a cause of action under the statute "all the surrounding facts and circumstances must be taken into consideration, and the whole case must be looked at in the light of its own particular facts." *Zayre of Virginia, Inc. v. Gowdy, 207 Va. 47, 50, 147 S.E.2d 710, 713 (1966)*; see also *Allen & Rocks, Inc. v. Dowell, 252 Va. 439, 443, 477 S.E.2d 741, 743 (1996)* (defendants correctly argued that the language used by the chairman explaining former employee's work performance did not provoke violence or breach of the peace, as required to sustain a claim for insulting words).

**Damages and Defenses.** The preceding Scope Note discussion of principles applicable to defamation should be consulted in preparing instructions for a jury in a case involving the analogous tort of insulting words.

**Instruction No. 37.000**
**Liability Issues (Public Figure/Defamatory *Per Se*)**

[For use in a case involving a public figure plaintiff, where the court has determined the statement is defamatory *per se*.]

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Did the defendant make the following statement:** (words of statement)?

(2) **Is the statement about the plaintiff?**

(3) **Was the statement** [heard; seen] **by someone other than the plaintiff?**

(4) **Is the statement false?**

(5) **Did the defendant make the statement knowing it to be false or did the defendant make it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false?**

(6) **If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?**

**On these issues the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Pendleton v. Newsome, 290 Va. 162, 171, 772 S.E.2d 759, 763 (2015); Tharpe v. Saunders, 285 Va. 476, 483–84, 737 S.E.2d 890, 894 (2013); Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 713, 636 S.E.2d 447, 449–50 (2006); Jordan v. Kollman, 269 Va. 569, 575–77, 580, 612 S.E.2d 203, 206–07, 209 (2005); Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993); Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 148, 334 S.E.2d 846, 850 (1985); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).* The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### Practice Commentary

See the detailed discussion in the Scope Note.

Elements (1), (2), (3), and (4): see Scope Note discussion of general pleading burdens in Virginia defamation law, including plaintiff's burden to prove falsity of the statement.

To be defamatory *per se*, the statements must:

(a) Impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished;

(b) Impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society;

(c) Impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; or

(d) Prejudice such person in his or her profession or trade.

*Tronfeld, 272 Va. at 713, 636 S.E.2d at 449–50*; *Fleming v. Moore, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981)* (adding that "[a]ll other defamatory words which though not in themselves actionable, occasion a person special damages are actionable.")

Note also that a defamatory statement can be made by inference, implication, or insinuation as long as the statement would actually defame the plaintiff. See *Pendleton 290 Va. at 172, 772 S.E.2d at 763*. The alleged defamatory implication, however, must be reasonably drawn from the words actually used. *Webb v. Virginian-Pilot Media Co., LLC, 287 Va. 84, 89, 752 S.E.2d 808, 811 (2014).*

Element (5): see Scope Note discussion of *New York Times* malice, which requires a showing that defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82–83 (1967) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).* The evidence must establish that the

defendant had a high degree of awareness of probable falsity. *Jordan v. Kollman, 269 Va. 569, 580, 612 S.E.2d 203, 209 (2005)*; *Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)*; *Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).*

See generally *Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985)* (private individuals must prove only negligence; however, *New York Times* malice is required where substantial danger to reputation is not apparent); *Gertz, 418 U.S. at 345* (limited-purpose public figures must prove *New York Times* malice); *Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)* (public figures must prove *New York Times* malice); *New York Times Co., 376 U.S. at 279–80* (public officials must prove *New York Times* malice).



### *ALERTS:*

- Use this Instruction with standard actual, presumed and punitive damage instructions. As set forth in the Scope Note, public figure plaintiffs may recover actual damages in any case where those can be demonstrated, presumed damages are available only in cases where the defamatory statement is actionable *per se,* and punitive damages are available only where *New York Times* malice is shown (some actual damage must be found unless the statement was defamatory *per se*).

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh B. Middleditch, Jr., VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.010
## Liability Issues (Public Figure/Not Defamatory *Per Se* or Private Figure/Substantial Danger to Plaintiff's Reputation Not Apparent)

[For use in cases involving a public figure plaintiff, where the court has determined the statement is **NOT** defamatory *per se,* **AND** in cases where the plaintiff is a private figure and the court has determined that the statement did **NOT** make substantial danger to the plaintiff's reputation apparent.]

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

**(1) Did the defendant make the following statement:** (words of statement)**?**

**(2) Is the statement about the plaintiff?**

**(3) Was the statement** [heard; seen] **by someone other than the plaintiff?**

**(4) Is the statement false?**

**(5) Did the defendant make the statement knowing it to be false or did the defendant make it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false?**

**(6) Did the statement tend to so harm the reputation of the plaintiff as to lower him in the estimation of the community, to deter others from associating or dealing with him, or make the plaintiff seem repulsive, infamous, or ridiculous?**

**(7) Was the plaintiff damaged as a result of the statement?**

**(8) If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?**

**On these issues the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** See Case Authority to Instruction No. 37.000. The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### PRACTICE COMMENTARY

See the detailed discussion in the Scope Note. You must analyze your case in light of the United States Supreme Court cases, particularly *Time, Inc. v. Firestone, 424 U.S. 448 (1976)*; *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*; *Curtis Publ'g v. Butts, 388 U.S. 130 (1967)*; *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*.

Use this Instruction with standard actual and punitive damage instructions. As set forth in the Scope Note, all public figure and private plaintiffs may recover actual damages in any case where those can be demonstrated. Presumed damages are recoverable only in cases where the defamatory statement is actionable *per se*, and hence are not available in the circumstances where the present Instruction applies. Punitive damages are available to both categories of plaintiffs where *New York Times* malice is shown (some actual damage must be found unless the statement was defamatory *per se*).

Elements (1), (2), (3), and (4): see Scope Note discussion of general pleading burdens in Virginia defamation law, including plaintiff's burden to prove falsity of the statement.

Element (5): see Scope Note discussion of *New York Times* malice, which requires a showing that defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82–83 (1967) (quoting New York Times, 376 U.S. at 279–80)*. The evidence must establish that the defendant had a high degree of awareness of probable falsity. *Jordan v. Kollman, 269 Va. 569, 580, 612 S.E.2d 203, 209 (2005)*; *Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)*; *Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)*.

See generally *Gertz, 418 U.S. at 345* (limited purpose public figures must prove *New York Times* malice); *Curtis Publ'g Co., 388 U.S. at 164* (public figures must prove *New York Times* malice); *Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985)* (private individuals must prove only negligence; however, *New York Times* malice is required where substantial danger to reputation is not apparent).

Element (6): the statement must have a certain "sting" to be actionable. See *Schaecher v. Bouffault, 290 Va. 83, 92, 772 S.E.2d 589, 594 (2015)*. The Court has used several formulations in describing what constitute the requisite sting. *Id.*

☞ ***PRACTICE POINTER:*** It is for the court, not the jury, to determine as a matter

of law whether an allegedly defamatory statement is one of fact or one of opinion. *Handberg v. Goldberg, 297 Va. 660, 667, 671–72, 831 S.E.2d 700, 706, 708 (2019)*; *Sroufe v. Waldron, 297 Va. 396, 398, 829 S.E.2d 262, 263 (2019)*; *Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 47, 670 S.E.2d 746, 750 (2009)*. For example, the Supreme Court of Virginia set aside a jury verdict where both statements of opinion and statements of fact were submitted to the jury and the jury instruction allowed a verdict in favor of the plaintiff on any single statement the jury found defamatory. *Handberg, 297 Va. at 672–73, 831 S.E.2d at 708–09*; *Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 306, 641 S.E.2d 84, 92 (2007)*. As a consequence, the jury must be instructed in element (1) by listing specifically only those actionable factual statements that the jury can consider in determining whether the defendant defamed the plaintiff. Statements of mere opinion that cannot be the basis for a defamation claim must be excluded from the list. *Handberg, 297 Va. at 672, 831 S.E.2d at 708.*



***ALERTS:***

- This is only a model issue instruction; it may or may not apply to your case without being modified.

- If an issue is not disputed, it should not be mentioned in the issue instruction. For example, if everyone agrees that the statement is about the plaintiff, you should eliminate numbered subparagraph (3) and renumber the subsequent subparagraphs.

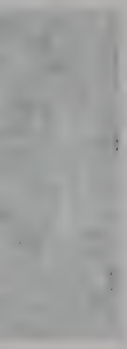
***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49



## Instruction No. 37.020
## Liability Issues (Private Plaintiff/Danger to Plaintiff's Reputation Apparent)

[For use in a case involving a private plaintiff (not a public figure), where the court has determined the statement makes substantial danger to the plaintiff's reputation apparent,]

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Did the defendant make the following statement:** (words of statement)**?**

(2) **Is the statement about the plaintiff?**

(3) **Was the statement** [heard; seen] **by someone other than the plaintiff?**

(4) **Is the statement false?**

(5) **Did the defendant make the statement knowing it to be false or, believing it to be true, did the defendant lack reasonable grounds for such belief or act negligently in failing to ascertain the facts on which the statement was based?**

(6) **If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?**

**On these issues the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### Practice Commentary

See the detailed discussion in the Scope Note.

Elements (1), (2), (3), and (4): see Scope Note discussion of general pleading burdens in modern Virginia defamation law, including plaintiff's burden to prove falsity of the statement.

Element (5): see Scope Note discussion of *Gazette, Inc.*, in particular, and the summary of liability rules with respect to private party plaintiffs. "The plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based." *Gazette, Inc. v. Harris, 229 Va. 1, 15, 325 S.E.2d 713, 725 (1985)*; see also *Government Micro Resources, Inc. v. Jackson, 271 Va. 29, 42, 624 S.E.2d 63, 70 (2006)*; *WJLA-TV v. Levin, 264 Va. 140, 154, 564 S.E.2d 383, 391 (2002)*.

Use this Instruction with actual and punitive damage instructions. As set forth in the Scope Note, all private plaintiffs may recover actual damages in any case where those can be demonstrated. Use Instruction No. 37.100 with the present Instruction. Punitive damages are available to private (as well as public figure) plaintiffs where *New York Times* malice is shown (some actual damage must be found unless the statement was defamatory *per se*). *New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)*. Use Instruction No. 37.110 or 37.111 with these instructions.

Recovery of *presumed* damages is limited to the cases where the defamatory statement is actionable *per se*. No presumed damage instruction should be given to accompany the present Instruction if the statement is not defamatory *per se*.

If the statement is found defamatory *per se*, it will be necessary to determine whether the statement touches matters of public concern or involves private matters. If the statement is defamatory *per se* and does not involve matters of public concern, the private plaintiff can recover presumed damages based on negligence. Use Instruction No. 37.105 regarding presumed damages in that situation. However, if the statement is defamatory *per se* but involves public concerns, the plaintiff can recover presumed damages only upon showing *New York Times* malice. *New York Times Co., 376 U.S. at 279–80*. Use Instruction No. 37.107 regarding presumed damages in those cases.

The negligence standard may be submitted to the jury where the defamatory statement makes substantial danger to reputation apparent. This is a question of law to be resolved by the trial court, rather than the jury. *WJLA-TV, 264 Va. at 154, 564 S.E.2d at 391; Gazette, Inc. 229 Va. at 15, 325 S.E.2d at 724–25.*

☞ ***PRACTICE POINTER:*** It is for the court, not the jury, to determine as a matter of law whether an allegedly defamatory statement is one of fact or one of opinion. *Handberg v. Goldberg, 297 Va. 660, 667, 831 S.E.2d 700, 706 (2019)*; *Sroufe v. Waldron, 297 Va. 396, 398, 829 S.E.2d 262, 263 (2019)*; *Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 47, 670 S.E.2d 746, 750 (2009)*; *Jordan v. Kollman, 269 Va. 569, 576, 612 S.E.2d 203, 206–07 (2005)*; *Chaves v. Johnson, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985)*. For example, the Supreme Court of Virginia set aside a jury verdict where both statements of opinion and statements of fact were submitted to the jury and the jury instruction allowed a verdict in favor of the plaintiff on any single statement the jury found defamatory. *Handberg, 297 Va. at 672–73, 831 S.E.2d at 708–09*; *Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 306, 641 S.E.2d 84, 92 (2007)*. As a consequence, the jury must be instructed in element (1) by listing specifically only those actionable factual statements that the jury can consider in determining whether the defendant defamed the plaintiff. Statements of mere opinion that cannot be the basis for a defamation claim must be excluded from the list. *Handberg, 297 Va. at 672, 831 S.E.2d at 708.*



### ***ALERTS:***

- Speech which does not contain provably false factual connotation or statements which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action. *Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 714, 636 S.E.2d 447, 450 (2006)*; *Yeagle v. Collegiate Times, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998).*

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.030**
**Insulting Words**

[A statement is insulting; Words are an insult] **if people in the community usually mean and commonly accept** [it as an insult; them as insults] **and if** [it tends; they tend] **to cause violence and a breach of the peace.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-45, 18.2-417.

**CASE AUTHORITY:** *Allen & Rocks, Inc. v. Dowell, 252 Va. 439, 442, 477 S.E.2d 741, 742 (1996)*; *Zayre of Virginia, Inc. v. Gowdy, 207 Va. 47, 50, 147 S.E.2d 710, 713 (1966)*; *Moss v. Harwood, 102 Va. 386, 389–90, 46 S.E. 385, 386 (1904)*; *Chaffin v. Lynch, 83 Va. 106, 112–13, 1 S.E. 803, 806–08 (1887).*

### PRACTICE COMMENTARY

See Scope Note.

The statutory insulting words action is an action for libel or slander except that no publication is necessary. *Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 6–7, 82 S.E.2d 588, 591 (1954).*

"[A]ll the surrounding facts and circumstances must be taken into consideration" when determining if such words give rise to a claim for insulting words. *Zayre of Virginia, Inc., 207 Va. at 50, 147 S.E.2d at 713 (1966).*

### *ALERTS:*

- To constitute insulting words in the context of a labor dispute, the language used must reasonably be understood, under the circumstances of the labor dispute, to convey a false representation of fact. *Crawford v. United Steelworkers, 230 Va. 217, 229, 234–35, 335 S.E.2d 828, 835, 838–39 (1985).*

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.050**
**Privilege**

**Under certain circumstances, a person has a limited privilege to make a defamatory statement about another without being liable for damages.**

**Under the circumstances of this case, the defendant's statement was privileged because he has an interest or duty in the subject, and he made the statement to another person with similar interest or duty. The defendant's statement is not protected, however, if he abused the privilege.**

**The privilege is abused when the plaintiff proves by clear and convincing evidence that:**

**(1) the defendant knew the statement was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false; or**

**(2) the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or**

**(3) the statement was unnecessarily insulting; or**

**(4) the language used was stronger or more violent than was necessary under the circumstances; or**

**(5) the statement was made because of personal spite, hatred, ill will, or desire to hurt the plaintiff, independent of the occasion on which the communication was made.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Cashion v. Smith, 286 Va. 327, 337–39, 749 S.E.2d 526, 532–33 (2013)*; *Lindeman v. Lesnick, 268 Va. 532, 537–38, 604 S.E.2d 55, 58 (2004)*; *Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 134–35, 575 S.E.2d 858, 862–63 (2003)*; *Larimore v. Blaylock, 259 Va. 568, 572–73, 528 S.E.2d 119, 120–22 (2000)*; *Schnupp v. Smith, 249 Va. 353, 365, 457 S.E.2d 42, 49 (1995)*; *Southeastern Tidewater Opportunity Project, Inc. v. Bade, 246 Va. 273, 276–77, 435 S.E.2d 131, 132–33 (1993)*; *Smalls v. Wright, 241 Va. 52, 54–55, 399 S.E.2d 805, 807 (1991)*; *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 153–54, 334 S.E.2d 846, 853–54 (1985)*; *Luhring v. Carter, 193 Va. 529, 540–42, 69 S.E.2d 416, 422–24 (1952)*.

## PRACTICE COMMENTARY

The existence of a privilege is a question of law while the abuse of a privilege is a jury question. *Fuste, 265 Va. at 134–35, 575 S.E.2d at 862–63*. For the definition of privilege in general, see *Luhring, 193 Va. at 540–42, 69 S.E.2d at 422–24*.

The defense of privilege is a matter of public policy, the idea being that by reason of a public or social interest that is entitled to protection, immunity is granted from liability for defamation that otherwise would be actionable. 50 Am Jur. 2d, Libel and Slander § 292. See also *Larimore, 259 Va. at 573, 528 S.E.2d at 121* (employer-employee context). Virginia recognizes both qualified and absolute privileges and counsel should determine from the case law what constitutes a qualified privilege as opposed to an absolute privilege.

To defeat a qualified privilege, a plaintiff may prove by clear and convincing evidence common law malice, which is defined as "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which a communication was made." *Gazette, Inc. v. Harris, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985)*. The privilege instructions in this Chapter incorporate language used in various Virginia cases that have discussed the elements of common-law malice and abuse of a qualified privilege. See *Great Coastal Express, Inc., 230 Va. at 153–54, 334 S.E.2d 853–54*; see, e.g., *Preston v. Land, 220 Va. 118, 120–21, 255 S.E.2d 509, 511 (1979)* (defamatory words uttered under qualified privilege are actionable only if actuated by "hatred, revenge, personal spite, ill will, or desire to injure" plaintiff); *Crawford & Co. v. Graves, 199 Va. 495, 499, 100 S.E.2d 714, 717 (1957)* (privilege lost if words used were "disproportioned in strength and violence to the occasion"); *Montgomery Ward & Co. v. Nance, 165 Va. 363, 379–80, 182 S.E. 264, 270 (1935)* (privilege lost if defamatory words in presence of third person who has no interest or duty in the matter); *Chalkley v. Atlantic C. L. R. Co., 150 Va. 301, 306–07, 143 S.E. 631, 632 (1928)* (malice which avoids privilege exists where words used were "not believe[d] to be true").

For specific privileges, see *Lindeman v. Lesnick, 268 Va. at 537–38, 604 S.E.2d*

*at 58* (extent of absolute, or judicial, privilege); *Larimore v. Blaylock, 259 Va. at 572–73, 528 S.E.2d at 121–22* (employer-employee communications); *Elder v. Holland, 208 Va. 15, 21–22, 155 S.E.2d 369, 373–75 (1967)* (informal administrative proceeding, employer-employee communications); *Haycox v. Dunn, 200 Va. 212, 228–32, 104 S.E.2d 800, 811–13 (1958)* (privilege of making a reply in self-defense in publication and reply to a defamatory statement); *Alexandria Gazette v. West, 198 Va. 154, 159–60, 93 S.E.2d 274, 279–80 (1956)* (privilege of reporting public records, including judicial records); *Montgomery Ward & Co. v. Nance, 165 Va. 363, 378–79, 182 S.E. 264, 270 (1935).*

An absolute privilege for testimony to a legislative body only applies to proceedings of the body which concern the creation of legislation, and not when the body is acting in a supervisory or administrative capacity. *Isle of Wight County v. Nogiec, 281 Va. 140, 151–56, 704 S.E.2d 83, 88–90 (2011).*

☞ ***PRACTICE POINTER:*** The defendant must first establish the existence of the privilege. Then, the plaintiff has the burden to prove abuse of the privilege. *Cashion, 286 Va. at 338, 749 S.E.2d at 532.*

### ***ALERTS:***

- Counsel should determine from the case law what constitutes a qualified privilege as opposed to an absolute privilege. Only those portions of this instruction supported by the evidence should be given. *Great Coastal Express, Inc., 230 Va. at 153–54, 334 S.E.2d at 853–54.*

- When a plaintiff's defamation claim involves church governance and "cannot be considered in isolation, separate and apart from the church's decision to terminate his employment," civil courts lack jurisdiction to consider the claim. *Cha v. Korean Presbyterian Church, 262 Va. 604, 613–15, 553 S.E.2d 511, 516 (2001).* But see *Bowie v. Murphy, 271 Va. 126, 133–35, 624 S.E.2d 74, 78–80 (2006)* (holding that plaintiff's defamation claim against his pastor arising from the pastor's claim that plaintiff perpetrated an assault did not require the court to become involved in matters of church governance).

- If the instruction is being used as a finding instruction, as opposed to an issue instruction, the sentence stating: "The privilege is abused when the plaintiff proves by clear and convincing evidence that . . ." should be changed to read: "You shall find that the defendant abused the privilege if the plaintiff proved by clear and convincing evidence that . . . ."

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.060
## Merchant: Probable Cause

**If** [a merchant; an agent or employee of the merchant] **had probable cause to believe that a customer had shoplifted or willfully concealed merchandise at the time he caused the customer's detention or arrest, then the merchant is not liable** [for defamatory statements; for insulting words] **made in connection therewith.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-226.9.

**CASE AUTHORITY:** *Tweedy v. J.C. Penney Co., 216 Va. 596, 599–600, 221 S.E.2d 152, 155–56 (1976)*; *F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 248–49, 198 S.E.2d 595, 597–99 (1973).*

### PRACTICE COMMENTARY

Shoplifting is the commonly accepted word for the offense of willful concealment of merchandise.

Va. Code Ann. § 8.01-226.9 states that a merchant is not liable for slander if the merchant had probable cause to believe that a customer had shoplifted or willfully concealed merchandise at the time the merchant caused the customer's detention or arrest. The burden is on the merchant to prove probable cause as an affirmative defense. *Tweedy, 216 Va. at 599–600, 221 S.E.2d at 155–56.* Whether probable cause is proven depends upon whether the circumstances disclosed by the evidence were such as to justify an ordinary prudent person in acting as the merchant acted. *F.B.C. Stores, 214 Va. at 251, 198 S.E.2d at 599.*

The legislative intent of the merchant privilege is the recognition that police officers cannot be omnipresent and the legislature wanted to immunize a "merchant, agent or employee of the merchant" who, either on the store premises or after close pursuit off the premises, restrains and detains those the merchant has "probable cause to believe" have "committed willful concealment of goods or merchandise" against civil liability for defamation and insulting words committed in the course of such restraint and detention. *Id., 214 Va. at 250, 198 S.E.2d at 599.* This statute does not provide the merchant with absolute immunity as the immunity is lost in circumstances in which the tort is committed in a willful, wanton or otherwise unreasonable or excessive manner. *Jury v. Giant of Md., Inc., 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.090**
**Finding Instruction (for use with Instruction No. 37.000)**

[For use in a case involving a public figure plaintiff, where the court has determined the statement to be defamatory *per se.*]

**You shall return your verdict for the plaintiff if the plaintiff has proved by the greater weight of the evidence that:**

**(1) defendant made the following statement:** (words of statement)**; and**

**(2) it was** [heard; seen] **by someone other than the plaintiff; and**

**(3) it was about the plaintiff; and**

**(4) it was false; and**

**if the plaintiff further proved by clear and convincing evidence**

**(5) that the defendant knew the statement was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false.** [; and

**(6)** that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the** (number of elements) **elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** See Case Authority to Instruction No. 37.000. The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See generally Scope Note.

### PRACTICE COMMENTARY

This finding instruction corresponds to Instruction No. 37.000. For a finding instruction in an action by a plaintiff required to prove falsity and negligence, see Instruction No. 37.097.

### *ALERTS:*

- Element (6) would only be used if the defendant had a qualified privilege and Instruction No. 37.050 is given.
- The finding instruction must address all of the issues and, if there are multiple counts with different issues, the instructions given should adequately differentiate those counts.
- This is only a model finding instruction and it may or may not apply to your case without being modified.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.095**
**Finding Instruction (for use with Instruction No. 37.010)**

[For use with Instruction 37.010, in cases involving a public figure plaintiff, where the court has determined the statement is **NOT** defamatory *per se,* **AND** in cases where the plaintiff is a private figure and the court has determined that the statement did **NOT** make substantial danger to the plaintiff's reputation apparent.]

**You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

**(1) the defendant made the following statement:** (words of statement)**; and**

**(2) it was about the plaintiff; and**

**(3) it was** [heard; seen] **by someone other than the plaintiff; and**

**(4) it was false; and**

**(5) the statement** [tends to so harm the reputation of the plaintiff as to lower him in the estimation of the community or to deter others from associating or dealing with him; the statement makes the plaintiff seem repulsive, infamous, or ridiculous]**; and**

**(6) the plaintiff sustained actual damage as a result of the statement, and**

**if the plaintiff further proved by clear and convincing evidence**

**(7) that the defendant knew the statement to be false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false.** [; and

**(8)** that the defendant abused his or her privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the** (number of elements) **elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** See Case Authority to Instruction No. 37.000. The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### PRACTICE COMMENTARY

This finding instruction corresponds to Instruction No. 37.010.

Element (5): the statement must have a certain "sting" to be actionable. See *Schaecher v. Bouffault, 290 Va. 83, 91–92, 772 S.E.2d 589, 594 (2015)*. The Court has used several formulations in describing what constitute the requisite sting. *Id.*

See the Scope Note for a discussion concerning the elements of this cause of action.

### *ALERTS:*

- Element (8) would only be used if the defendant had a qualified privilege and Instruction No. 37.050 is given.
- The finding instruction must address all of the issues and, if there are multiple counts with different issues, the instructions given should adequately differentiate those counts.
- This is only a model finding instruction and it may or may not apply to your case without being modified; see Practice Commentary to Instruction No. 37.010.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.097**
**Finding Instruction (for use with Instruction No. 37.020)**

[For use with Instruction No. 37.020, in a case involving a private plaintiff (not a public figure) where the court has determined that the statement makes substantial danger to the plaintiff's reputation apparent because it is *per se* defamation.]

**You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

**(1) the defendant made the following statement:** (words of statement)**; and**

**(2) it was about the plaintiff; and**

**(3) it was** [heard; seen] **by someone other than the plaintiff; and**

**(4) it was false; and**

**(5) the defendant made the statement** [knowing it to be false; believing it to be true but lacked reasonable grounds for such belief; acted negligently in failing to ascertain the facts on which the statement was based]**.** [; and

if the plaintiff further proved by clear and convincing evidence

**(6)** that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the** (number of elements) **element above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** See Case Authority to Instruction No. 37.000. The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### PRACTICE COMMENTARY

See the Scope Note for a discussion concerning the elements of this cause of action.

Note also that a defamatory statement can be made by inference, implication, or insinuation as long as the statement would actually defame the Plaintiff. See *Pendleton v. Newsome, 290 Va. 162, 172 772 S.E.2d 759, 763 (2015).*

This finding instruction corresponds to Instruction No. 37.020. For finding instructions in actions where the plaintiff is required to prove *New York Times* malice, see Instructions No. 37.090 and 37.095.

Note also the damage instruction options discussed in the Practice Commentary accompanying Instruction No. 37.020. As set forth in the Scope Note, all private plaintiffs may recover actual damages in any case where those can be demonstrated. Use Instruction No. 37.100 with the present Instruction. Punitive damages are available to private (as well as public figure) plaintiffs where *New York Times* malice is shown (some actual damage must be found unless the statement was defamatory *per se*). Use Instruction No. 37.110 or Instruction No. 37.111 with these instructions.

Recovery of presumed damages is limited to the cases where the defamatory statement is actionable *per se*. No presumed damage instruction should be given to accompany the present Instruction if the statement is not defamatory *per se*.

If the statement is found defamatory *per se*, it must be determined whether the statement touches matters of public concern or involves private matters. If the statement is defamatory *per se* and does not involve matters of public concern, the private plaintiff can recover presumed damages based on negligence. Use Instruction No. 37.105 regarding presumed damages in that situation. However, if the statement is defamatory *per se* but involves public concerns, plaintiff can recover presumed damages only upon showing *New York Times* malice. Use Instruction No. 37.107 regarding presumed damages in those cases.

### *ALERTS:*

- The finding instruction must address all of the issues and, if there are multiple counts with different issues, the instructions given should adequately differentiate those counts.
- This is only a model finding instruction and it may or may not apply to your case without being modified; see Practice Commentary to Instruction No. 37.020.
- Element (6) would only be used if the defendant had a qualified privilege and Instruction No. 37.050 is given.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.098
## Finding Instruction (for use with Instruction No. 37.020)

[For use with Instruction No. 37.020 in a case involving a private plaintiff (not a public figure), where the court has determined the statement makes substantial danger to the plaintiff's reputation apparent, but it is not *per se* defamation.]

**You shall return your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

**(1) the defendant made the following statement:** (words of statement)**; and**

**(2) it was about the plaintiff; and**

**(3) it was** [heard; seen] **by someone other than the plaintiff; and**

**(4) it was false; and**

**(5) the defendant made the statement** [knowing it to be false; believing it to be true but lacking reasonable grounds for such belief; acting negligently in failing to ascertain the facts on which the statement was based]**; and**

**(6) the plaintiff sustained actual damage as a result of the statement.** [; and

(7) if the plaintiff further proved by clear and convincing evidence that the defendant abused his privilege to make a defamatory statement, as described in Instruction No. _____ (Instruction No. 37.050)]

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the** (number of elements) **elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** The tort of defamation is governed by both Virginia and U.S. Supreme Court law. See Scope Note.

### PRACTICE COMMENTARY

This finding instruction corresponds to Instruction No. 37.020. For finding instructions in actions where the plaintiff is required to prove *New York Times* malice, see Instructions No. 37.090 and 37.095.

See the Scope Note for a discussion concerning the elements of this cause of action.

### *ALERTS:*

- Element (7) would only be used if the defendant had a qualified privilege and Instruction No. 37.050 is given.
- The finding instruction must address all of the issues and, if there are multiple counts with different issues, the instructions given should adequately differentiate those counts.
- This is only a model finding instruction and it may or may not apply to your case without being modified; see the Practice Commentary to Instruction No. 37.020.
- Note also the damage instruction options discussed in the Practice Commentary to Instruction Nos. 37.020 and 37.097.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.100**
**Actual Damages**

**If you find your verdict for the plaintiff, then in determining the amount of damages to which he is entitled, you may take into consideration all of the circumstances surrounding the statement, the occasion on which it was made and the extent of its publication, the nature and character of the insult, the probable effect on those who heard the statement, and its probable and natural effect upon the plaintiff's personal feelings and upon his standing in the community and in business.**

**Your verdict should be for an amount that will fully and fairly compensate him for:**

**(1) any loss or injury to his business;**

**(2) any insult to him including any pain, embarrassment, humiliation, or mental suffering;**

**(3) any injury to his reputation; and**

**(4) any actual, out-of-pocket losses that were caused by the statement.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** *As to Element (1)*, Va. Code Ann. § 8.01-221.1.

**CASE AUTHORITY:** *Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)*; *Government Micro Resources, Inc., v. Jackson, 271 Va. 29, 47–49, 624 S.E.2d 63, 73–74 (2006)*; *WJLA-TV v. Levin, 264 Va. 140, 163–64, 564 S.E.2d 383, 396–97 (2002)*; *Poulston v. Rock, 251 Va. 254, 261–62, 467 S.E.2d 479, 483–84 (1996)*; *Gazette, Inc. v. Harris, 229 Va. 1, 13, 325 S.E.2d 713, 723–24 (1985)*; *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 151, 334 S.E.2d 846, 852 (1985)*; *Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981)*.

## PRACTICE COMMENTARY

**General and Special Damages.** The terms "actual damages" and "compensatory damages" are synonymous and include all damages other than punitive damages. *News Leader Co. v. Kocen, 173 Va. 95, 108, 3 S.E.2d 385, 391 (1939)*. They generally consist of (a) the value of damage to reputation, mental anguish, humiliation, and embarrassment, whose monetary value is not subject to proof with mathematical precision, but is established by some evidence, sometimes known as "general damages," and (b) quantifiable, out-of-pocket monetary loss or expense that is measurable in the same manner as damages in other tort actions, e.g., medical expenses, lost income, lost profits, etc., sometimes identified as "special damages." *Fleming v. Moore, 221 Va. at, 894, 275 S.E.2d at 638–39*; *Slaughter v. Valleydale Packers, Inc., 198 Va. 339, 346, 94 S.E.2d 260, 266 (1956)*. In *Gertz*, the Supreme Court held:

> [w]e need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

*Gertz, 418 U.S. at 349–50.*

**Recovery Requiring Malice for Public Officials or Public Figures.** Any public official, public figure, or private figure plaintiff who successfully establishes liability on the part of a defendant may recover actual damages for such injuries. However, no public official or public figure can receive actual damages unless they have first proven malice as to the underlying claim under the *New York Times* fault standard. *Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1966)*; *New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964)*.

**Lost Profit**

Va. Code Ann. § 8.01-221.1 provides that:

"Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits

because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation."

☞ ***PRACTICE POINTER:*** Instruction No. 9.010, Damages: Reasonable Proof, should be used with this instruction.

☞ ***PRACTICE POINTER:*** The Supreme Court of Virginia has often noted that a plaintiff with an unblemished reputation is entitled to recover more damages when subjected to defamatory statements than one whose reputation is a "little hurt" by the statements. *Poulston, 251 Va. at 262, 467 S.E.2d at 484; Stubbs v. Cowden, 179 Va. 190, 200, 18 S.E.2d 275, 280 (1942); Weatherford v. Birchett, 158 Va. 741, 747, 164 S.E. 535, 537 (1932).*



### ***ALERTS:***

- If the plaintiff is entitled to a verdict and if he or she proves actual monetary losses, then by definition, he or she is entitled to recover them.

- While there is no fixed standard for measuring compensatory damages, and the award is largely a matter of jury discretion, the amount of the award must bear a "reasonable relation to the damages sustained." *Gazette, Inc., 229 Va. at 48, 325 S.E.2d at 745.*

- Actual damages apparently only need to be proved by the greater weight of the evidence. The jury must be instructed that the plaintiff has the burden of proof on the issue of damages. See Chapter 3, Issues, Burden of Proof and Finding Instructions, for additional guidance on instructions.

- Punitive damages and/or presumed damages may be recovered in addition to actual damages. See Instruction Nos. 37.105 and 37.110.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.105
## Presumed Damages

[For use where the statement is defamatory *per se* and plaintiff has established liability (1) as a public figure under Instruction No. 37.090, or (2) as a private plaintiff showing negligence under Instruction No. 37.095 in a case where the statement does not involve matters of public concern.]

**If you find your verdict for the plaintiff, the plaintiff is entitled to recover compensatory damages without any proof of actual or pecuniary injury. The statement alleged in this case is understood to mean that the** [plaintiff has committed the crime of (name of crime involving moral turpitude); plaintiff would commit the crime of (name of crime involving moral turpitude); plaintiff has a contagious disease offensive to society; plaintiff is unfit to perform the duties of his employment; plaintiff lacks integrity or is dishonest in performing the duties of his employment; the effect of the words is prejudicial to the plaintiff in his work or chosen profession]**. As a result, injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:**

***United States Case Authority***

*Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)*; *Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)*; *Gertz v. Robert Welch, 418 U.S. 323 (1974).*

***Virginia Case Authority***

*Askew v. Collins, 283 Va. 482, 485–86, 722 S.E.2d 249, 251 (2012)*; *Lewis v. Kei, 281 Va. 715, 726–27, 708 S.E.2d 884, 891–92 (2011)*; *WJLA-TV v. Levin, 264 Va. 140, 154–55, 564 S.E.2d 383, 391–92 (2002)*; *Poulston v. Rock, 251 Va. 254, 261, 467 S.E.2d 479, 483 (1996)*; *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 151–52, 334 S.E.2d 846, 853 (1985)*; *Fleming v. Moore, 221 Va. 884, 889–90, 275 S.E.2d 632, 635–36 (1981)*; *Slaughter v. Valleydale Packers, Inc., 198 Va. 339, 346–48, 94 S.E.2d 260, 266–67 (1956).*

## Practice Commentary

This instruction does not specify a burden of proof because, in the two situations where it applies, the plaintiff will have already established the requisite scienter to establish liability (public figure plaintiffs will have proven *New York Times* malice, and a private individual in a defamation *per se* case involving no public concerns will have shown negligence).

**Private-figure plaintiffs.** Private figure plaintiffs can recover presumed damages arising from statements actionable *per se,* involving no matters of public concern, on a showing of negligence. *Great Coastal Express, Inc., 230 Va. at 151, 334 S.E.2d at 852*; *Gazette, Inc., 229 Va. 1, 15, 325 S.E.2d 713, 724–25 (1985).* See *Dun & Bradstreet, 472 U.S. at 761* (actual malice not required in cases involving statements not touching matters of public concern).

***Per Se* Defamation Involving Matters of Public Concern; Malice Requirement.** Where a private figure plaintiff alleges defamation *per se* involving a matter of public concern, presumed damages cannot be awarded absent proof of malice as to the underlying claim under the *New York Times* fault standard. *WJLA-TV v. Levin, 264 Va. at 155, 564 S.E.2d at 391–92 (2002)*; *Great Coastal Express, Inc. 230 Va. at 150–51, 334 S.E.2d at 852.* "In defamation actions based on statements regarding matters of public concern, actual [*New York Times*] malice must be proved before presumed or punitive damages can be awarded." *Shenandoah Pub. House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993).* See also *Milkovich v. Lorain Journal Co., 497 U.S. at 16–17*; *Gertz v. Robert Welch, Inc., 418 U.S. at 349.*

**Public official and public figure plaintiffs and presumed damages.** The Court in *Gazette, Inc.* indicates that presumed damages may be recovered by public official and public figure plaintiffs as well. *229 Va. at 10–11, 325 S.E.2d at 722.* The demonstration of *New York Times* malice such plaintiffs must make to prevail

in any defamation action is sufficient to support an award of presumed damages. *229 Va. at 10–11, 325 S.E.2d at 722.*

**Amount of Presumed Damages.** Even in the absence of any evidence of pecuniary loss, the damages which the injured party is entitled to recover may be substantial. *Poulston, 251 Va. at 261, 467 S.E.2d at 483.* In *James v. Powell, 154 Va. 96, 117, 152 S.E. 539, 547 (1930)*, a case involving defamation *per se,* the Court upheld a jury instruction stating that:

"in determining the amount of [presumed] damages to which the plaintiff may be entitled, you shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they were expressed, and its tendency, the occasion on which they were published, the extent of their circulation, the probable effect upon those to whose attention they came, and their natural and probable effect upon the plaintiffs' personal feelings, and his standing in the community in which he lives; and if under the other instructions herein, he is entitled to recover, you shall award such sum by way of damages as will fairly and adequately compensate him for the insult to him, including any pain and mortification and mental suffering inflicted upon him, and for any injury to his reputation as a man and citizen."



***ALERTS:***

- Presumed damages may be recovered by public and private individuals only if the statements are actionable *per se, Gazette, Inc., 229 Va. at 10–11, 325 S.E.2d at 722.* No case has yet applied the doctrine of presumed damages in a context where the judge has found that the danger to plaintiff's reputation is apparent, but the defamation is not in one of the traditional *per se* categories.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.107**
**Presumed Damages (Public Concern)**

[For use with a private plaintiff where the statement is defamatory *per se,* and the statement touches matters of public concern, and plaintiff has established liability under Instruction No. 37.098.]

**If you find your verdict for the plaintiff, and you further find that the plaintiff proved by clear and convincing evidence that the defendant made the alleged defamatory statement knowing that it was false or made it so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, the plaintiff is entitled to recover compensatory damages without any proof of actual or pecuniary injury. The statement alleged in this case is understood to mean that the** [plaintiff has committed the crime of (name of crime involving moral turpitude); plaintiff would commit the crime of (name of crime involving moral turpitude); plaintiff has a contagious disease offensive to society; plaintiff is dishonest in performing the duties of his employment; the effect of the words is prejudicial to the plaintiff in his work or chosen profession]**. As a result, if you find that the defendant made the alleged defamatory statement knowing that it was false or with reckless disregard for its truth or falsity, injury to the plaintiff's personal and business reputation, humiliation, and embarrassment is presumed.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:**

***United States Case Authority***

*Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)*; *Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)*; *Gertz v. Robert Welch, 418 U.S. 323 (1974).*

***Virginia Case Authority***

*WJLA-TV v. Levin, 264 Va. 140, 564 S.E.2d 383 (2002)*; *Poulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1996)*; *Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985).* See also *Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981)*; *Slaughter v. Valleydale Packers, Inc., 198 Va. 339, 94 S.E.2d 260 (1956).*

### PRACTICE COMMENTARY

This instruction specifies a burden of proof, because it applies in the situation where a plaintiff can prevail on a showing of negligence for recovery of actual damages but must show *New York Times* malice in order to warrant recovery of presumed damages. See Scope Note discussion of presumed damage recovery in Virginia, and see the Practice Commentary to Instruction No. 37.105.

In the *Slaughter* case an instruction conflicting with the language of this Instruction was held to have been erroneously given. See *198 Va. at 346–48, 94 S.E.2d at 266–67.* Hence, the language set out in this Instruction has been deemed to be correct and a plaintiff is entitled to it under the circumstances noted in brackets at the beginning of the Instruction.

### *ALERTS:*

- Presumed damages may be recovered by public and private individuals only if the statements are actionable *per se, Gazette, Inc., 229 Va. at 10–11, 325 S.E.2d at 722.* No case has yet applied the doctrine of presumed damages in a context where the judge has found that the danger to plaintiff's reputation is apparent, but the defamation is not in one of the traditional *per se* categories.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.110
## Punitive Damages (Defamatory *Per Se*)

[For use where the statement is found defamatory *per se.*]

**Once you have found by clear and convincing evidence that a defendant made the statements knowing they were false or made them so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, then you may award punitive damages to punish that defendant for such actions and to serve as an example to prevent others from making such statements in the future.**

**You must state separately in your verdict any amount you allow as compensatory damages, if any, and the amount you allow as punitive damages.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:**

***United States Case Authority***

*Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)*; *Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985)*; *Gertz v. Robert Welch, 418 U.S. 323 (1974).*

***Virginia Case Authority***

*Poulston v. Rock, 251 Va. 254, 264, 467 S.E.2d 479, 484–85 (1996)*; *Ingles v. Dively, 246 Va. 244, 253–54, 435 S.E.2d 641, 645–46 (1993)*; *Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)*; *Gazette, Inc. v. Harris, 229 Va. 1, 13, 325 S.E.2d 713, 723–24 (1985)*; *Fleming v. Moore, 221 Va. 884, 893–94, 275 S.E.2d 632, 638 (1981)*; *Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976)*; *Rosenberg v. Mason, 157 Va. 215, 245–47, 160 S.E. 190, 201 (1931)*; *Windsor v. Carlton, 136 Va. 652, 653–56, 118 S.E. 222, 222–23 (1923)*; *Harman v. Cundiff, 82 Va. 239, 244 (1886).*

## PRACTICE COMMENTARY

Any defamation plaintiff in Virginia may recover punitive damages only upon a clear and convincing showing that the defendant acted with *New York Times* malice. *Burke, 216 Va. at 803, 224 S.E.2d at 135.* This standard applies to private individuals. *Fleming, 221 Va. at 893–94, 275 S.E.2d at 638.* See generally *Milkovich v. Lorain Journal Co., 497 U.S. 1, 16–17 (1990)*; *Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).* The Court in *Gazette, Inc.* noted that public figures, and limited purpose public figures may recover punitive damages only upon a clear and convincing showing that the defendant acted with *New York Times* malice. *229 Va. at 10–12, 325 S.E.2d at 722–23* (noting the holding in *Newspaper Publishing Corp.*, was "incorrect" to premise an award of punitive damages on common law malice rather than *New York Times* "actual malice").

**Actual Damage Requirement; exception in *per se* cases.** The general rule in Virginia with respect to punitive damages for defamation is that unless compensatory damages are awarded, the plaintiff may not recover punitive damages. *Fleming, 221 Va. at 893–94, 275 S.E.2d at 638.* The exception to this general rule is that punitive damages alone may be awarded where the statements are actionable *per se*. *221 Va. at 894, 275 S.E.2d at 638.* It may be appropriate to instruct the jury that it is not necessary to award compensatory damages in order to award punitive damages.

## *ALERTS:*

- This instruction should not be given unless there is evidence of *New York Times* malice.

- Even where *New York Times* malice is proved, "[t]he amount of punitive damages awarded should bear some reasonable relationship to the actual damages

sustained and to the measure of punishment required." *Gazette, Inc., 229 Va. at 51, 325 S.E.2d at 747.*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.111
## Punitive Damages (Not Defamatory *Per Se*)

[For use where the statement is not defamatory *per se*.]

**If you find that the plaintiff is entitled to recover compensatory damages, and if you further find by clear and convincing evidence that a defendant made the statements knowing the statement was false or made the statements so recklessly as to amount to a willful disregard for the truth, that is, with a high degree of awareness that the statement was probably false, then you may also award punitive damages to punish that defendant for such actions and to serve as an example to prevent others from making such statements in the future.**

**If you award punitive damages, you must state separately in your verdict any amount you allow as compensatory damages and the amount you allow as punitive damages.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The present alternative Instruction is made available because, in Virginia, if the litigated statement is not defamatory *per se,* punitive damages may only be awarded if the jury finds that there is at least some form of compensatory award appropriate in the case. See Practice Commentary to Instruction No. 37.110.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

## Instruction No. 37.120
## Mitigation of Damages: Actions Against Newspapers, Magazines, or Periodicals

**You have heard evidence of the circumstances of publication, including the source of the information** [its character as affording reasonable ground of reliance, any prior publication, or an apology or retraction made by the defendant with reasonable promptness and fairness]. **You may consider this in mitigation of compensatory or punitive damages, but you may not consider it in mitigation of any out-of-pocket losses actually incurred by the plaintiff.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-48.

**CASE AUTHORITY:** *News Leader Co. v. Kocen, 173 Va. 95, 105–06, 3 S.E.2d 385, 389–90 (1939)* (decided under corresponding provisions of former law).

### PRACTICE COMMENTARY

This instruction is applicable, whether punitive damages are sought or not, "[i]n any civil action against the publisher, owner, editor, reporter or employee of any newspaper, magazine or periodical under Va. Code Ann. § 8.01-45, or for libel or defamation, because of any article, statement or other matter contained in any such newspaper, magazine or periodical." Va. Code Ann. § 8.01-48.

Va. Code Ann. § 8.01-49 concerns the liability of radio and television stations for defamation.

### *ALERTS:*

- The defendant may introduce in evidence only such circumstances of the publication and to the extent set forth in the defendant's answer. Va. Code Ann. § 8.01-48.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

**Instruction No. 37.130**
**Mitigation of Damages: Apology**

**You have heard evidence that the defendant apologized or offered to apologize to the plaintiff for the statement he made. You may consider this evidence only in mitigation of damages.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-46, 8.01-48.

**CASE AUTHORITY:** *News Leader Co. v. Kocen, 173 Va. 95, 105–06, 111, 3 S.E.2d 385, 389–90, 392 (1939)*; *James v. Powell, 154 Va. 96, 118, 152 S.E. 539, 547 (1930).*

### PRACTICE COMMENTARY

An apology under Va. Code Ann. § 8.01-46 must be made before the commencement of the action, or where the defendant had no opportunity of making or offering an apology before commencement of the case, then as soon after commencement as the defendant has the opportunity of making an apology. Va. Code Ann. § 8.01-46; see *James, 154 Va. at 118, 152 S.E. at 547 (1930).* Evidence of an apology may also be offered in mitigation of an action for insulting words. *Hogan v. Wilmoth, 57 Va. 80, 87 (1860).*

Va. Code Ann. § 8.01-46 is not limited to newspapers, magazines, or periodicals. It allows a defendant to present evidence of an apology in mitigation of damages.

### *ALERTS:*

- Evidence of an apology by a publisher, owner, director, editor, reporter or employee of any newspaper, magazine or periodical, in an action for insulting words, Va. Code Ann. § 8.01-45, or defamation, may be introduced in mitigation of general or punitive damages, or either, but not actual pecuniary damages. Va. Code Ann. § 8.01-48; see Instruction No. 37.120.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.16

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, § 2.10

Kent Sinclair, VIRGINIA REMEDIES, Chapter 14

MICHIE'S JURISPRUDENCE, Libel and Slander §§ 1 through 49

# Chapter 38

# FALSE IMPRISONMENT

## Scope Note


**Instruction No. 38.000** **Definition of False Imprisonment**

**Instruction No. 38.010** **Good Faith Not a Defense**

**Instruction No. 38.020** **Lawful Arrest**

**Instruction No. 38.030** **Unnecessary Delay After Arrest**

**Instruction No. 38.040** **Willful Concealment, Shoplifting**

**Instruction No. 38.045** **Probable Cause**

**Instruction No. 38.060** **Burden of Proof: No Affirmative Defense Asserted**

**Instruction No. 38.070** **Burden of Proof: Affirmative Defense Asserted**

**Instruction No. 38.080** **Finding Instruction: No Affirmative Defense Asserted**

**Instruction No. 38.090** **Finding Instruction: Affirmative Defense Asserted**

# SCOPE NOTE

There are ten instructions on false imprisonment. Instruction No. 38.000, Definition of False Imprisonment, defines the basic elements of this cause of action. Instruction, No. 38.010, Good Faith Not a Defense, emphasizes the strictness of the definition; if someone's freedom of movement is unlawfully restrained, then he was falsely imprisoned even if the one who restrained him thought that his actions were proper. *Crosswhite v. Barnes, 139 Va. 471, 485, 124 S.E. 242, 246 (1924).* This principle of law does not apply to law enforcement officers in all circumstances. See *DeChene v. Smallwood, 226 Va. 475, 479, 311 S.E.2d 749, 751 (1984).* Although there is no instruction on this point, one who is arrested cannot seek to show the unlawfulness of the arrest by proving that he was acquitted of the charge on which he was arrested. *Montgomery Ward & Co. v. Wickline, 188 Va. 485, 491, 50 S.E.2d 387, 390 (1948).* As the trial judge normally excludes proof of the plaintiff's acquittal or conviction as irrelevant, no instruction is needed on this point. Rather than invite error through inappropriate use of an instruction on this point, the Committee elected to allow the lawyer who was faced with a case where there was proof of acquittal or conviction to draft an instruction appropriate to those facts. In 2020 the Supreme Court offered no negative comment upon an instruction that referenced an acquittal in the criminal trial. *Cromartie v. Billings, 298 Va. 284, 294, 837 S.E.2d 247, 252–53 (2020).*

Instruction No. 38.020, Lawful Arrest, states that a lawful arrest is a legal excuse for restraining someone's freedom of movement. The Practice Commentary to this instruction discusses in some detail the types of lawful arrests recognized in Virginia.

Instruction No. 30.030, Unnecessary Delay After Arrest, covers the more unusual false imprisonment situation where the suit is brought on a claim that the interval between the physical arrest and time that the arrestee was brought before a judicial officer was unreasonably long. Particularly in metropolitan areas, the arresting officer may not be the one who physically brings the arrestee before the judicial officer. If there is an unreasonably long delay attributable to someone other than the arresting officer, a difficult question is presented as to whether the arresting officer and the one responsible for the delay are both liable. There is no Virginia law to resolve this problem, however.

Although good faith is not a defense to a false imprisonment claim except for law enforcement officers, Va. Code Ann. § 18.2-105.1 permits a merchant to detain someone whom the merchant has probable cause to believe has shoplifted, i.e., willfully concealed goods, for a period not to exceed one hour pending arrival of a law enforcement officer. Instruction No. 38.040, Willful Concealment, Shoplifting, addresses this statutory right. See also Va. Code Ann. § 8.01-226.9; *Jury v. Giant of Maryland, 254 Va. 235, 491 S.E.2d 718 (1997).* Va. Code Ann. § 8.01-226.9 does not, however, provide a merchant with absolute immunity under circumstances in which the conduct of the merchant is committed in a willful, wanton, or otherwise unreasonable or excessive manner. *Jury, 254 Va. at 239, 491 S.E.2d at 720.* For a more detailed discussion of the burdens of proof under Va. Code Ann. § 8.01-226.9, see Chapter 41, Malicious Prosecution, Instruction 41.070, Probable Cause: Willful Concealment or Shoplifting.

Instruction No. 38.045 states the standard of probable cause for a merchant who

detains a suspected shoplifter.

There are two burdens of proof and two finding instructions in standard format. Instruction Nos. 38.060, Burdens of Proof: No Affirmative Defense Asserted, and 38.080, Finding Instruction: No Affirmative Defense Asserted, are for use where no affirmative defenses are raised. Instruction Nos. 38.070, Burden of Proof: Affirmative Defense Asserted, and 38.090, Finding Instruction: Affirmative Defense Asserted, are for cases in which there is sufficient evidence of an affirmative defense to raise a jury question. Where Instruction No. 3.000, Issues and Allocation of Burdens of Proof, has been adapted for use in a case, the first paragraph of Instruction No. 38.060 or 38.070 should be omitted.

A compensatory damage instruction for false imprisonment cases is not provided. Instruction No. 9.000, General Personal Injury and Property Damage, may be modified as applicable. Attorney fees incurred to counsel in defending an underlying action may be recoverable if the false imprisonment was with malice. *Carlson v. Wells, 281 Va. 173, 188, 705 S.E.2d 101, 109 (2011)*; *Burruss v. Hines, 94 Va. 413, 420, 26 S.E. 875, 877 (1897).*

There must be sufficient proof of actual malice before an instruction on punitive damages is appropriate. *F. B. C. Stores, Inc. v. Duncan, 214 Va. 246, 252, 198 S.E.2d 595, 600 (1973).* Regarding due process requirements for jury instructions on punitive damages, see the discussion in the Scope Note to Chapter 9, Damages. Where appropriate, adapt the general punitive damage and actual malice instructions, Nos. 9.080, General Punitive Damages, and 9.090, Punitive Damages: Definition of Common Law Actual Malice, to the facts of the case. Evidence of good faith can be offered in mitigation of punitive damages. *Sands & Co. v. Norvell, 126 Va. 384, 399, 101 S.E. 569, 573 (1919).* The opponent of such evidence is entitled to a limiting instruction when the evidence is offered and probably when the jury is instructed. For examples, see Instruction Nos. 37.120, Mitigation of Damages, and 37.130, Mitigation of Damages: Apology. There is authority that the general bad character of the plaintiff is admissible to mitigate damages. *Dellastatious v. Boyce, 152 Va. 368, 391, 147 S.E. 267, 274 (1929).* In neither instance where evidence in mitigation of damages is admitted does the defendant have any burden of proof.

## Instruction No. 38.000
## Definition of False Imprisonment

**False imprisonment is an intentional restriction of a person's freedom of movement without legal right.**

**A false imprisonment results from the intentional use of force, words, or acts which the person restrained is afraid to ignore or to which he reasonably believes he must submit.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Dill v. Kroger Ltd. P'ship, 300 Va. 99,114, 860 S.E.2d 372, 380–81 (2021)*; *Cromartie v. Billings, 298 Va. 284, 307, 837 S.E.2d 247, 259 (2020)*; *Lewis v. Kei, 281 Va. 715, 724–25, 708 S.E.2d 884, 890–91 (2011)*; *Jordan v. Shands, 255 Va. 492, 497, 500 S.E.2d 215, 218 (1998)*; *Montgomery Ward & Co. v. Wickline, 188 Va. 485, 489–492, 50 S.E.2d 387, 388–390 (1948)*; *W.T. Grant Co. v. Owens, 149 Va. 906, 921–22, 141 S.E. 860, 865 (1928)*.

### PRACTICE COMMENTARY

Merely reckless or negligent confinement is not false imprisonment. To constitute false imprisonment, there must be an actual or legal intent to restrain someone although there need be no intent to arrest. *See* AMERICAN JURISPRUDENCE 2D, False Imprisonment §§ 1–3; CORPUS JURIS SECUNDUM, False Imprisonment § 3.

"[A] plaintiff cannot maintain an action for false imprisonment because of an arrest pursuant to a regular and valid warrant; that is, if the imprisonment results from her being 'taken in due course to the magistrate and there admitted to bail or imprisoned regularly upon due order of commitment from him'." *Dill, 300 Va. at 114, 860 S.E.2d at 381* (quoting *Lewis, 281 Va. at 724, 708 S.E.2d 884*).

"To maintain an action for false imprisonment it is not necessary to show malice, ill will or the slightest wrongful intention." *Zayre of Virginia, Inc. v. Gowdy, 207 Va. 47, 51, 147 S.E.2d 710, 714 (1966)*.

☞ ***PRACTICE POINTER:*** On an employer's liability for arrest caused by its employee, see *Manuel v. Cassada, 190 Va. 906, 913–14, 59 S.E.2d 47, 50 (1950)*; *Montgomery Ward & Co., 188 Va. at 489, 50 S.E.2d at 389 (1948)*.

☞ ***PRACTICE POINTER:*** A judicial officer acting in accordance with his jurisdiction is immune from civil liability for his official acts. *Berry v. Smith, 148 Va. 424, 426–28, 139 S.E. 252, 253 (1927)*; *Bolton v. Vellines, 94 Va. 393, 403, 26 S.E. 847, 849–850 (1897)*; *Johnston v. Moorman, 80 Va. 131, 139 (1885)*. He is also immune from suit in federal court under 42 U.S.C. § 1983. *Stump v. Sparkman, 435 U.S. 349, 362–64 (1978)*; *Pierson v. Ray, 386 U.S. 547, 553–554 (1967)*.

### *ALERTS:*

- The person restrained need not be confined in jail or placed in the custody of a guard or law enforcement officer. *Zayre of Virginia, Inc., 207 Va. at 50–51, 147 S.E.2d at 713*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6
MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.010**
**Good Faith Not a Defense**

**It is not a legal defense to a claim of false imprisonment that one had an honest or a reasonable belief that he was acting lawfully in restricting another's freedom. Any intentional restriction of a person's freedom that is without legal right is a false imprisonment.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.01-226.9 if the one accused of false imprisonment is a merchant.

**CASE AUTHORITY:** *Zayre of Virginia, Inc. v. Gowdy, 207 Va. 47, 51, 147 S.E.2d 710, 713 (1966)*; *Crosswhite v. Barnes, 139 Va. 471, 485, 124 S.E. 242, 246 (1924).*

### PRACTICE COMMENTARY

Even though probable cause is not a defense (except for merchants) probable cause will mitigate or eliminate punitive damages. *Zayre, 207 Va. at 53, 147 S.E.2d at 714*; *Crosswhite, 139 Va. at 485, 124 S.E. at 246.* A lawful arrest is a defense to a false imprisonment claim. *Lewis v. Kei, 281 Va. 715, 724–25, 708 S.E.2d 884, 890–91 (2011).* See Instruction No. 38.020, Lawful Arrest.

A merchant who has probable cause to believe that the plaintiff willfully concealed or shoplifted merchandise may detain the plaintiff for up to one hour pending arrival of a law enforcement officer. Va. Code Ann. § 18.2-105.1. The merchant's probable cause is a defense to a false imprisonment claim. Va. Code Ann. § 8.01-226.9; Instruction No. 38.040, Willful Concealment, Shoplifting. A merchant must have acted reasonably. *Jury v. Giant of Maryland, 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997).* A similar statute protects owners or lessees of commercial movie theaters from persons who are illegally recording. Va. Code Ann. § 18.2-187.2(B).

### *ALERTS:*

- This instruction does not apply to law enforcement officers. An arrest resulting from a mistake in law or a mistake in fact is not false imprisonment if the arresting officer acted in good faith and upon reasonable belief in the validity of the arrest. *DeChene v. Smallwood, 226 Va. 475, 479, 311 S.E.2d 749, 751 (1984).* See Instruction No. 38.020, Lawful Arrest.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.020**
**Lawful Arrest**

**A lawful arrest is a restraint of another's movement with the legal right to do so.**

## Sources & Authority

**Governing Statutes:** See the Practice Commentary below.

**Case Authority:** *Lewis v. Kei, 281 Va. 715, 724–25, 708 S.E.2d 884, 890–91 (2011)*; *Montgomery Ward & Co. v. Wickline, 188 Va. 485, 489, 50 S.E.2d 387, 389 (1948).*

## Practice Commentary

There are many types of lawful arrests recognized in Virginia, a number of which are discussed below separately. Often whether an arrest was lawful will be a question for the judge to decide on a motion to strike the plaintiff's evidence. When a jury question is raised, use either the applicable numbered paragraph below or your own paragraph defining the type of arrest involved. The jury must be instructed on who has the burden of proof, and the finding instruction must be modified appropriately.

**(1) An arrest made by a law enforcement officer with a valid warrant for the arrest of that person is a lawful arrest. The warrant must be in the arresting officer's possession if the arrest is for a misdemeanor, unless the officer receives a radio message from his department or other law enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.**

Statutes: Va. Code Ann. §§ 19.2-76, 19.2-81; see also Va. Code Ann. §§ 19.2-71 to 19.2-75 (regarding the issuance and process of warrants).

Cases: *Dill v. Kroger Ltd. P'ship, 300 Va. 99, 114, 860 S.E.2d 372, 381 (2021)*; *Montgomery Ward, 188 Va. at 489, 50 S.E.2d at 389.*

**(2) An arrest by a law enforcement officer for a criminal offense committed in his presence is a lawful arrest.**

Statutes: Va. Code Ann. § 19.2-81.

Cases: *Cromartie v. Billings, 298 Va. 284, 837 S.E.2d 247 (2020).*

☞ ***Practice Pointer:*** Presence means that the law enforcement officer had direct personal knowledge by means of sight, hearing, or some other sense. *Galliher v. Commonwealth, 161 Va. 1014, 1021, 170 S.E. 734, 736 (1933).*

**(3) An arrest by a law enforcement officer who had probable cause or reasonable grounds to suspect that the individual he arrested had committed a felony is a lawful arrest.**

Statutes: Va. Code Ann. § 19.2-81.

Cases: *Crowder v. Commonwealth, 213 Va. 151, 152–153, 191 S.E.2d 239, 240 (1972).*

☞ ***Practice Pointer:*** Probable cause is not a defense to a false imprisonment claim, except for merchants who detain shoplifters on probable cause (Instruction No. 38.040), and law enforcement officers who have probable cause to believe that the individual they arrested committed a felony. Cf. *Yeatts v. Minton, 211 Va. 402,*

*406, 177 S.E.2d 646, 649 (1970).* But see Va. Code Ann. § 19.2-100 (authorizing a private person to effect an arrest in some circumstances).

**(4) An arrest by a law enforcement officer who had probable cause to believe that the individual he arrested was committing a misdemeanor in his presence is a lawful arrest even if it is later discovered that the officer was mistaken.**

Statutes: None.

Cases: *DeChene, 226 Va. at 478, 311 S.E.2d at 750*; *Yeatts, 211 Va. at 405, 177 S.E.2d at 648; Banner v. Commonwealth, 204 Va. 640, 648, 133 S.E.2d 305, 311 (1963)* (discussing the threshhold of evidence required to give an instruction on lawful arrest).

**(5) An arrest by any person who has reasonable information that the arrested individual was charged with a felony is a lawful arrest.**

Statutes: Va. Code Ann. § 19.2-100.

Cases: *Hudson v. Commonwealth, 266 Va. 371, 379, 585 S.E.2d 583, 588 (2003).*

☞ ***PRACTICE POINTER:*** Information or facts derived from credible sources or from persons reasonably presumed to know them may justify an arrest without a warrant by a private citizen of someone who has committed a felony. See Va. Code Ann. § 19.2-100 (certain arrests by private citizens permissible if based on "reasonable information"). Also, it is a generally recognized right of a private citizen to arrest for a felony not committed in his presence if a felony has in fact been committed and the private citizen has probable or reasonable cause to believe that the person arrested committed the felony. *Hudson, 266 Va. at 379, 585 S.E.2d at 588.* Note here, however, that there is liability if the private citizen arrests someone who did not commit a felony, whereas a law enforcement officer is not liable as long as he has probable cause to believe that a felony was committed by the one he arrested.

**(6) An arrest by anyone for a felony committed in his presence is a lawful arrest.**

Statutes: None.

Cases: *Byrd v. Commonwealth, 158 Va. 897, 902, 164 S.E. 400, 402 (1932).*

☞ ***PRACTICE POINTER:*** Presence is discussed in subparagraph (2) above.

**(7) An arrest by anyone for a breach of the peace committed in his presence is a lawful arrest.**

Statutes: None.

Cases: *Hudson, 266 Va. at 379, 585 S.E.2d at 588; Byrd, 158 Va. at 902, 164 S.E. at 402.*

☞ ***PRACTICE POINTER:*** This arrest is only lawful until a law enforcement officer is available. Va. Code Ann. § 19.2-100.

**(8) An arrest by a law enforcement officer, even without a warrant, for shoplifting or willful concealment of merchandise not committed in his presence, when the arrest is based upon probable cause upon reasonable complaint of a person who observed the offense, is a lawful arrest.**

Statutes: Va. Code Ann. § 19.2-81.

Cases: None.

**(9) An arrest by a law enforcement officer, even without a warrant, for assault and battery against a family or household member not committed in his presence, when the arrest is based upon (a) probable cause, (b) personal observations, (c) the reasonable complaint of a person who observed the alleged offense, or (d) personal investigation, is a lawful arrest.**

Statutes: Va. Code Ann. §§ 19.2-81.3, 18.2-57.2.

Cases: None.

**(10) An arrest by a law enforcement officer, even without a warrant, for a violation of any provision of a protective order issued for stalking, although the violation did not occur in his presence, when the arrest is based upon (a) probable cause, (b) personal observations, (c) the reasonable complaint of a person who observed the alleged offense, or (d) personal investigation, is a lawful arrest.**

Statutes: Va. Code Ann. §§ 19.2-81.3, 18.2-60.4.

Cases: None.

**(11) An arrest by a law enforcement officer, even without a warrant, for a violation of any provision of a protective order issued to protect a child's life, health, safety or development, although the violations did not occur in his presence, when the arrest is based upon (a) probable cause, (b) personal observations, (c) the reasonable complaint of a person who observed the alleged offense, or (d) personal investigation, is a lawful arrest.**

Statutes: Va. Code Ann. §§ 19.2-81.3, 16.1-253.2, 16.1-253.

Cases: None.

**(12) An arrest by a law enforcement officer, even without a warrant, for a violation of any provision of a protective order issued to protect an alleged victim of family abuse, although the violation did not occur in his presence, when the arrest is based upon (a) probable cause, (b) personal observations, (c) the reasonable complaint of a person who observed the alleged offense, or (d) personal investigation, is a lawful arrest.**

Statutes: Va. Code Ann. §§ 19.2-81.3, 18.2-57.2.

Cases: None.

***ALERTS:***

• The only question in a false arrest case is the legality of the detention. For types of lawful arrests generally, see Va. Code Ann. § 19.2-81. See also Va. Code

Ann. § 19.2-81.3 (arrest without warrant in cases of assault and battery against family or household member in violation of Va. Code Ann. § 18.2-57.2, or in cases of violations of stalking protective orders and protective orders issued to protect a child's life, health, safety or normal development, or an alleged victim of family abuse, in violation of Va. Code Ann. §§ 18.2-60.4 and 16.1-253.2), Va. Code Ann. § 19.2-81.1 (power of correctional officer to make arrests), and Va. Code Ann. § 29.1-205 (power of game warden to make arrests), as well as the statutes cited in the Practice Commentary.

• For the instruction addressing the burden of proof of the defendant's affirmative defense of the right to restrict plaintiff's freedom of movement, see Instruction No. 38.070, Burden of Proof: Affirmative Defense Asserted.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

## Instruction No. 38.030
## Unnecessary Delay After Arrest

**An officer who makes an arrest** [with a lawful warrant; without a warrant] **has a legal duty to bring the person he arrested before a judge or magistrate** [without unnecessary delay; forthwith]**. If the officer fails to perform this duty, then he has falsely imprisoned the person he arrested even if the arrest itself was lawful.**

**You may consider the circumstances that existed after the arrest and until the plaintiff was brought before the judge or magistrate in deciding whether** [there was an unnecessary delay; this legal duty was complied with]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 19.2-80, 19.2-82, 19.2-100.

**CASE AUTHORITY:** *McHone v. Commonwealth, 190 Va. 435, 441, 57 S.E.2d 109, 112–13 (1950)*; *Mullins v. Sanders, 189 Va. 624, 630, 54 S.E.2d 116, 120 (1949)*; *Sands & Co. v. Norvell, 126 Va. 384, 400, 101 S.E. 569, 574 (1919).*

### PRACTICE COMMENTARY

Someone who precipitates the lawful arrest of another person is not responsible for any delay caused by the arresting officer unless the person caused or encouraged the delay. *Mullins, 189 Va. at 632, 54 S.E.2d at 121.*

Reasonable promptness depends on the circumstances of each case, including the availability of a judicial officer, other essential duties of the arresting officer, the physical or mental condition of the prisoner, and other factors. *McHone, 190 Va. at 441, 57 S.E.2d at 113.*

☞ ***PRACTICE POINTER:*** Note the different requirements for an arrest with a warrant—without unnecessary delay (Va. Code Ann. § 19.2-80)—and for an arrest without a warrant—forthwith (Va. Code Ann. § 19.2-82).

### *ALERTS:*

- It may be difficult to decide if the arresting officer is liable for an unreasonable delay if local procedures dictate that the arresting officer is not the one whose duty it is to bring the person arrested before the judicial officer and if the delay is caused by the one who is responsible. The officer may still be liable, but there are no cases in Virginia on this question. It is clear that the one who caused the delay is liable. *Mullins, 189 Va. at 630–631, 54 S.E.2d at 120.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

## Instruction No. 38.040
## Willful Concealment, Shoplifting

[A merchant; An agent of a merchant; An employee of a merchant] **who detains a person for not more than one hour is not liable for false imprisonment if he has probable cause to believe that the person has willfully** [concealed; shoplifted; stolen] **goods or merchandise.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-226.9, 18.2-105.1, 18.2-106.

**CASE AUTHORITY:** *Tweedy v. J.C. Penney Co., 216 Va. 596, 599, 221 S.E.2d 152, 155 (1976)*; *F.B.C. Stores v. Duncan, 214 Va. 246, 249–50, 198 S.E.2d 595, 598–99 (1973).*

### PRACTICE COMMENTARY

The test for probable cause is whether the circumstances disclosed by the evidence were such as to justify an ordinarily prudent person in acting as the defendant acted. *Tweedy, 216 Va. at 599, 221 S.E.2d at 155.* See Instruction No. 38.045, Probable Cause.

A merchant's immunity under this statute is not absolute. The immunity does not apply if the detention is committed in an unreasonable or excessive manner. *Jury v. Giant of Maryland, 254 Va. 235, 239, 491 S.E.2d 718, 720 (1997).*

The owners or lessees of commercial movie theaters are also insulated from liability for false imprisonment if they have probable cause to believe that someone is making an unauthorized audiovisual recording in the theater. Va. Code Ann. § 18.2-187.2(B). Similarly, libraries or their agents are protected if they detain individuals who are suspected of stealing or concealing library property. Va. Code Ann. § 42.1-73.1.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.045**
**Probable Cause**

[A merchant; An agent of a merchant; An employee of a merchant] **has probable cause to believe that a person has** [concealed; shoplifted; stolen] **goods or merchandise when the circumstances would cause an ordinarily prudent person to have such a belief.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.01-226.9, 18.2-105.1.

**CASE AUTHORITY:** *Tweedy v. J.C. Penney Co., 216 Va. 596, 599, 221 S.E.2d 152, 155 (1976).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction should be given in conjunction with Instruction No. 38.040, Willful Concealment: Shoplifting.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.060**
**Burden of Proof: No Affirmative Defense Asserted**

**The burden is on the plaintiff to prove false imprisonment.**

**When a party has the burden of proof on an issue, he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

The first sentence may not be necessary if Instruction No. 3.000, Issues and Burdens of Proof, has been adapted.

Although the Supreme Court has not squarely addressed the issue, it is settled law that the burden of proof of a plaintiff in a false imprisonment case is by a preponderance of the evidence. See *Wyatt v. McDermott, 283 Va. 685, 700, 725 S.E.2d 555, 563 (2012)* ("[T]he ordinary burden in civil actions [is] preponderance of the evidence."). See also *Sands & Co. v. Norvell, 126 Va. 384, 391, 101 S.E. 569, 571 (1919)* (illustrative case where jury instructed that the burden of proof in a false imprisonment case rests with the plaintiff and it is by a preponderance of the evidence).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.070**
**Burden of Proof: Affirmative Defense Asserted**

**The burden is on the plaintiff to prove false imprisonment.**

**The burden is on the defendant to prove** [that he had a legal right to restrict the plaintiff's freedom of movement; that he had probable cause to believe that a person was [concealing goods; shoplifting]; that the arrest was lawful].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Cromartie v. Billings, 298 Va. 284, 294–95, 837 S.E.2d 247, 252–53 (2020)*; *W. T. Grant Co. v. Owens, 149 Va. 906, 921–22, 141 S.E. 860, 865 (1928).*

### PRACTICE COMMENTARY

If you have adapted Instruction No. 3.000, Issues and Burdens of Proof, then you may not need to use this instruction.

Although the Supreme Court has not squarely addressed the issue, it is settled law that the burden of proof of a plaintiff in a false imprisonment case is by a preponderance of the evidence. See *Wyatt v. McDermott, 283 Va. 685, 700, 725 S.E.2d 555, 563 (2012)* ("[T]he ordinary burden in civil actions [is] preponderance of the evidence."). See also *Sands & Co. v. Norvell, 126 Va. 384, 391, 101 S.E. 569, 571 (1919)* (illustrative case where jury instructed that the burden of proof in a false imprisonment case rests with the plaintiff and it is by a preponderance of the evidence). See also *Jordan v. Shands, 255 Va. 492, 499, 500 S.E.2d 215, 219 (1998)* (discussing the burden of proof for a defendant who raises the qualified immunity defense); *DeChene v. Smallwood, 226 Va. 475, 479, 311 S.E.2d 749, 751 (1984)* (addressing the burden of proof for the defense that the arrest was lawful).

For the instruction on lawful arrest see Instruction No. 38.020, Lawful Arrest.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.080**
**Finding Instruction: No Affirmative Defense Asserted**

**You shall return your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally restricted the plaintiff's freedom of movement without legal right.**

**You shall return your verdict for the defendant if the plaintiff failed to prove that he was falsely imprisoned.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Intentional restriction of someone's freedom of movement without legal right is the classic definition of false imprisonment, but the plaintiff does not have to prove that the restriction was without legal right to make out a prima facie case of false imprisonment. If the defendant claims that he had a legal right to restrict the plaintiff's freedom of movement, it is his burden to prove it. *Cromartie v. Billings, 298 Va. 284, 295, 837 S.E.2d 247, 256 (2020)*; *W. T. Grant Co. v. Owens, 149 Va. 906, 921–22, 141 S.E. 860, 865 (1928)*. See Instruction No. 38.070, Burden of Proof: Affirmative Defense Asserted.

### *ALERTS:*

- Use this finding instruction with Instruction No. 38.060, Burden of Proof: No Affirmative Asserted, only when no affirmative defense is presented as a jury issue.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

**Instruction No. 38.090**
**Finding Instruction: Affirmative Defense Asserted**

**You shall return your verdict for the plaintiff if he proved by the greater weight of the evidence that the defendant intentionally restricted the plaintiff's freedom of movement without legal right.**

**You shall return your verdict for the defendant if:**

**(1) the plaintiff failed to prove a false arrest; or**

**(2) the defendant proved by the greater weight of the evidence that he had a legal right to restrain the plaintiff's freedom of movement.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Cromartie v. Billings, 298 Va. 284, 307, 837 S.E.2d 247, 260 (2020).*

### PRACTICE COMMENTARY

Legal arrest and probable cause for a merchant are affirmative defenses; they may be substituted for "legal right" in subparagraph (2) or added as additional subparagraphs where supported by the evidence.

### *ALERTS:*

- Use this finding instruction with Instruction No. 38.070, Burden of Proof: Affirmative Defense Asserted, when an affirmative defense is a jury issue.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 6.2, 6.4, 7.3, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 23.05, 25.03, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 4.4, 13.4

Kent Sinclair, VIRGINIA REMEDIES §§ 17-1 through 17-6

MICHIE'S JURISPRUDENCE, False Imprisonment §§ 1 through 20

# Chapter 39

# FRAUD

## Scope Note


| | |
|---|---|
| **Instruction No. 39.000** | **Definition of Actual Fraud: Intentional Misrepresentation** |
| **Instruction No. 39.010** | **Definition of Misrepresentation** |
| **Instruction No. 39.020** | **Definition of Material Fact** |
| **Instruction No. 39.030** | **Definition of Reliance** |
| **Instruction No. 39.040** | **Definition of Constructive Fraud** |
| **Instruction No. 39.045** | **Duty to Take Prompt Action** |
| **Instruction No. 39.050** | **Duty to Investigate** |
| **Instruction No. 39.060** | **Fact Versus Opinion** |
| **Instruction No. 39.070** | **Burden of Proof on Common Law Fraud: Clear and Convincing** |
| **Instruction No. 39.080** | **Factors that May Be Considered** |
| **Instruction No. 39.090** | **Finding Instruction Common Law: Actual Fraud** |
| **Instruction No. 39.100** | **Finding Instruction Common Law: Constructive Fraud** |
| **Instruction No. 39.110** | **Finding Instruction Common Law: Actual and Constructive Fraud** |

# SCOPE NOTE

These instructions are designed for use in a common law action for fraud. They do not necessarily encompass the use of fraud as a defense or as the basis for remedies in other actions. You must refer to the specific substantive areas to determine the effect of fraud. For example, in areas such as agency, contracts, personal and fiduciary relationships, fraudulent conveyances, crimes, and some provisions of the Uniform Commercial Code where fraud may be an issue, there may be particular considerations that are not dealt with in these general instructions.

There are separate instructions that define actual fraud (Instruction No. 39.000) and constructive fraud (Instruction No. 39.040). In addition, there are instructions defining misrepresentation (Instruction No. 39.010), material fact (Instruction No. 39.020), and reliance (Instruction No. 39.030). The situations in which a person has a duty to investigate are the topic of a separate instruction (Instruction No. 39.050). Opinion ("dealer's talk" or "puffing") is also defined in a separate instruction (Instruction No. 39.060).

The standard of proof for both common law actual fraud and common law constructive fraud is clear and convincing evidence. *Davis v. Marshall Homes, 265 Va. 159, 165, 576 S.E.2d 504, 506 (2003)*; *Eden v. Weight, 265 Va. 398, 405, 578 S.E.2d 769, 774 (2003)*. This chapter contains finding instructions for common law actual fraud (Instruction No. 39.090), common law constructive fraud (Instruction No. 39.100) and common law actual and constructive fraud (Instruction No. 39.110).

Although common law fraud must be proven by clear and convincing evidence, the burden of production of evidence can shift to the opposing party where undue influence is shown. Once this burden shifts, the opposing party has the burden of producing evidence tending to show undue influence did not occur. The elements of proof required to shift the burden of production of evidence are different for wills and deeds. For cases discussing the standards involving wills, see *Parish v. Parish, 281 Va. 191, 704 S.E.2d 99 (2011)*; *Carter v. Williams, 246 Va. 53, 58–59, 431 S.E.2d 297, 299 (1993)*; *Martin v. Phillips, 235 Va. 523, 528–529, 369 S.E.2d 397, 399–400 (1988)* (overruled in part by *Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 32, 597 S.E.2d 34, 39 (2004)*); *Jarvis v. Tonkin, 238 Va. 115, 120, 380 S.E.2d 900, 903 (1989)*. For cases discussing the standards involving deeds or other instruments, see *Friendly Ice Cream Corp., 268 Va. at 31–32, 597 S.E.2d at 38–39*; *Hanson v. Harding, 245 Va. 424, 426, 429 S.E.2d 20, 21 (1993)*; *Nuckols v. Nuckols, 228 Va. 25, 33, 320 S.E.2d 734, 738–39 (1984)*. Chapter 48 contains instructions relating to undue influence in will cases.

In a fraud action, the defrauded party may recover attorney's fees, but when deciding whether to award attorney's fees, the fact finder must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party. *St. John v. Thompson, 299 Va. 431, 435, 854 S.E.2d 648, 651 (2021)*; *Prospect Dev. Co. v. Bershader, 258 Va. 75, 92, 515 S.E.2d 291, 301 (1999)*. Actual fraud will support a claim for punitive damages where there is a showing of actual malice. *Jordan v. Sauve, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978)*. If punitive damages are appropriate, use Damages Instruction Nos. 9.080 and 9.090.

A model compensatory damage instruction for fraud cases is not included in this chapter because there are so many factual variations in the types of damages that can

be claimed. Generally, where fraud occurs in the context of a commercial transaction involving the transfer of real property, the measure of damages is the difference between the actual value of the property at the time the contract was made and the value of the property had the fraudulent representation been true. Damages in the form of costs of repair or replacement of defective elements are not proper measures of damages. *Klaiber v. Freemason Assocs., 266 Va. 478, 486, 587 S.E.2d 555, 559 (2003).*

For a case discussing damages in a fraud case see *Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 835, 27 S.E.2d 198, 203 (1943).*

Note: While the burden of proof for common law fraud is clear and convincing evidence, a plaintiff is required to prove a violation of the Virginia Consumer Protection Act only by a preponderance of the evidence. *Ballagh v. Fauber Enters., 290 Va. 120, 773 S.E.2d 366 (2015).* Thus, where the trial proceeds on a pleading which includes assertions that the alleged fraudulent act constitutes both a common law fraud and a violation of the Virginia Consumer Protection Act, two instructions on burden of proof should be given.

A cause of action for fraud and a cause of action under the Virginia Consumer Protection Act, Va. Code Ann. §§ 59.1-196 to 59.1-207 are not irreconcilable causes of action which require an election between them. A judgment in both causes of action requires that the trial court determine that there is not a duplicative recovery. *Wilkins v. Peninsula Motor Cars, 266 Va. 558, 561, 587 S.E.2d 581, 583 (2003).* The Act expressly provides, however, that "[a]ny person who accepts a cure offer under this chapter may not initiate or maintain any other or additional action based on any cause of action arising under any other statute or common law theory if such other action is substantially based on the same allegations of fact on which the action initiated under this chapter is based." Va. Code Ann. § 59.1-204(A).

Under specific facts and circumstances, construction fraud can be considered larceny. Va. Code Ann. § 18.2-200.1, *Bowman v. Commonwealth, 290 Va. 492, 777 S.E.2d 851 (2015).*

## Instruction No. 39.000
## Definition of Actual Fraud: Intentional Misrepresentation

**Actual fraud is a misrepresentation of a material fact, knowingly and intentionally made, with the intent to mislead another person, which that person relied upon with the result that he was damaged by it.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Caperton v. A.T. Massey Coal Co., 285 Va. 537, 553, 740 S.E.2d 1, 9 (2013)*; *State Farm Mut. Auto Ins. v. Remley, 270 Va. 209, 218, 618 S.E.2d 316, 321 (2005)*; *Davis v. Marshall Homes, 265 Va. 159, 165, 576 S.E.2d 504, 506 (2003)*; *Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003)*; *Prospect Dev. Co. v. Bershader, 258 Va. 75, 85, 515 S.E.2d 291, 297 (1999)*; *Packard Norfolk, Inc. v. Miller, 198 Va. 557, 561, 95 S.E.2d 207, 210 (1956)*; *Hicks v. Wynn, 137 Va. 186, 193, 119 S.E. 133, 135–36 (1923).*

### PRACTICE COMMENTARY

The elements of actual fraud are (1) a false representation; (2) of a material fact; (3) intentionally and knowingly made; (4) with the intent to mislead; (5) reliance by the party misled; and (6) resulting in damage to the party misled. *Remley, 270 Va. at 218, 618 S.E.2d at 321; Davis, 265 Va. at 165, 576 S.E.2d at 506; Cohn, 266 Va. at 367, 585 S.E.2d at 581.*

Fraud does not extend to misrepresentations of law because the law is presumed to be known by the parties. *Hicks, 137 Va. at 196, 119 S.E. at 136–37.* The misrepresentations must pertain to facts, although statements of law accompanied by misrepresentations of facts may well constitute fraud. See *Humphreys v. Baird, 197 Va. 667, 671, 90 S.E.2d 796, 799 (1956).*

Ordinarily, the material fact to which fraud relates must be a presently existing or pre-existing fact, not a mere expression of opinion or statement as to future events. *Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 362, 699 S.E.2d 483, 490 (2010)*; *McMillion v. Dryvit Sys., 262 Va. 463, 471, 552 S.E.2d 364, 368–69 (2001).* If a defendant makes a promise that, when made, he has no intention of performing, that promise is considered a misrepresentation of present fact and may form the basis for a claim of actual fraud. *SuperValu, Inc. Johnson, 276 Va. 356, 368, 666 S.E.2d 335, 342 (2008).* Where the position of the misled party is no worse than it would be if there had been no fraud, there is no damage. *The Cmty. Bank v. Wright, 221 Va. 172, 175, 267 S.E.2d 158, 160 (1980).*

Fraud may occur in the inducement to form a contract and also to induce the performance of an executory contract. *Abi-Najm, 280 Va. at 362, 699 S.E.2d at 489*; *Ware, 220 Va. at 319–20, 257 S.E.2d at 857.* But if the misrepresentation is made in the performance of a duty which arose solely by virtue of a contract between the parties, no action for fraud will lie. *MCR Fed., LLC v. JB&A, Inc., 294 Va. 446, 458–61, 808 S.E.2d 186, 193–94 (2017)*; *Station # 2, LLC v. Lynch, 280 Va. 166, 171, 695 S.E.2d 537, 540 (2010)*; *Dunn Constr. Co. v. Cloney, 278 Va. 260, 265–67, 682 S.E.2d 943, 946 (2009)*; *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998).*

### *ALERTS:*

- This instruction should be used only in cases of actual fraud, where the misrepresentation was knowingly and intentionally made. Where the misrepresen-

tation was not intentional, use Instruction No. 39.040, Definition of Constructive Fraud.

- A cause of action for false advertising brought pursuant to Va. Code Ann. §§ 59.1-68.3 and 18.2-216 does not sound in fraud. See *Klaiber v. Freemason Assocs., 266 Va. 478, 487, 587 S.E.2d 555, 558 (2003). Parker-Smith v. STO Corp., 262 Va. 432, 439, 551 S.E.2d 615, 619 (2001).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, Fraud & Deceit §§ 1 through 70

## Instruction No. 39.010
## Definition of Misrepresentation

**A misrepresentation is any words or conduct which produce a false or misleading impression of fact in the mind of another. The misrepresentation must be made concerning an actually existing or past fact. A promise, an expression of interest, or an expectation or opinion concerning the future is not a misrepresentation.**

**A misrepresentation may result from silence or from the suppression of facts as well as from an affirmative representation.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *SuperValu, Inc. v. Johnson, 276 Va. 356, 367–68, 666 S.E.2d 335, 342 (2008)*; *McMillion v. Dryvit Sys., 262 Va. 463, 471, 552 S.E.2d 364, 368–69 (2001)*; *Tate v. Colony House Builders, Inc., 257 Va. 78, 82, 508 S.E.2d 597, 599 (1999)*; *Prospect Dev. Co. v. Bershader, 258 Va. 75, 86, 515 S.E.2d 291, 297 (1999)*; *Blair Constr. v. Weatherford, 253 Va. 343, 346, 485 S.E.2d 137, 139 (1997)*; *Horner v. Ahern, 207 Va. 860, 865, 153 S.E.2d 216, 220 (1967)*; *Soble v. Herman, 175 Va. 489, 500–01, 9 S.E.2d 459, 464 (1940)*; *Lloyd v. Smith, 150 Va. 132, 145, 142 S.E. 363, 365 (1928).*

### PRACTICE COMMENTARY

Ordinarily, unfulfilled promises regarding future events, as opposed to statements concerning existing or pre-existing facts, cannot serve as a basis for fraud. *Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 362, 699 S.E.2d 483, 490 (2010)*; *Blair Constr., 253 Va. at 346, 485 S.E.2d at 139; Lumbermen's Underwriting Alliance v. Dave's Cabinet, Inc., 258 Va. 377, 382, 520 S.E.2d 362, 365 (1999); Patrick v. Summers, 235 Va. 452, 454, 369 S.E.2d 162, 164 (1988).* However, repeated assurances to a buyer of realty that an adjoining parcel would remain undeveloped in the future have been held to constitute actionable misrepresentations of existing facts. *Prospect Dev. Co. Inc., 258 Va. at 85–86, 515 S.E.2d at 296–97; Boykin v. Hermitage Realty, 234 Va. 26, 29–30, 360 S.E.2d 177, 178–79 (1987).*

"For purposes of an action for fraud, concealment, whether accomplished by word or conduct, may be the equivalent of a false representation, because concealment always involves deliberate nondisclosure designed to prevent another from hearing the truth." *Spence v. Griffin, 236 Va. 21, 28, 372 S.E.2d 595, 599 (1988).*

☞ ***PRACTICE POINTER:*** The final sentence of this instruction should be omitted where silence or suppression of facts is not an issue.

☞ ***PRACTICE POINTER:*** For cases on silence or concealment as fraud, see *Van Deusen v. Snead, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994)*; *Allen Realty Corp. v. Holbert, 227 Va. 441, 446, 318 S.E.2d 592, 595 (1984)*; *Kitchen v. Throckmorton, 223 Va. 164, 174, 286 S.E.2d 673, 677 (1982)*; *National Airlines v. Shea, 223 Va. 578, 583, 292 S.E.2d 308, 311 (1982)*; *City of Norfolk v. Bennett, 205 Va. 877, 881, 140 S.E.2d 655, 657 (1965)*; *Clay v. Butler, 132 Va. 464, 474, 112 S.E. 697, 700 (1922)*; *Crosby v. Buchanan, 90 U.S. 420, 457 (1874).*

### ALERTS:

- An opinion may rise to the level of a misrepresented fact if the one asserting the opinion knows that it is wrong. *Horner, 207 Va. at 865, 153 S.E.2d at 220.* The state of the promisor's mind at the time he makes the promise is a fact. A promise may be a misrepresentation of fact where a party knowingly and intentionally misstates his present intention to fulfill a promise, and may form the basis of a

claim in actual fraud, but not in constructive fraud. *Abi-Najm, 280 Va. at 362, 699 S.E.2d at 490*; *Station # 2, LLC v. Lynch, 280 Va. 166, 171, 695 S.E.2d 537, 540 (2010)*; *SuperValu, 276 Va. at 367–68, 666 S.E.2d at 342*; *Elliott v. Shore Stop, Inc., 238 Va. 237, 245, 384 S.E.2d 752, 756 (1989)*; *Boykin, 234 Va. at 29–30, 360 S.E.2d at 178–79*; *Lloyd, 150 Va. at 145–46, 142 S.E. at 365–66.*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, Fraud & Deceit §§ 1 through 70

**Instruction No. 39.020**
**Definition of Material Fact**

**A material fact is one which influences a person to act or not to act.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Spence v. Griffin, 236 Va. 21, 28, 372 S.E.2d 595, 598 (1988)*; *J.E. Robert Co. v. J. Robert Co., 231 Va. 338, 345, 343 S.E.2d 350, 355 (1986)*; *Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 713, 250 S.E.2d 352, 355 (1979)*; *Packard Norfolk, Inc. v. Miller, 198 Va. 557, 563, 95 S.E.2d 207, 211 (1956)*.

### PRACTICE COMMENTARY

See Comments to Instruction No. 39.000, Definition of Actual Fraud: Intentional Misrepresentation, Instruction No. 39.010, Definition of Misrepresentation and Instruction No. 39.040, Definition of Constructive Fraud.

"In fraud cases, 'a fact is material when it influences a person to enter into a contract, when it deceives him and induces him to act, or when without it the transaction would not have occurred.' " *Spence, 236 Va. at 28 n*, 372 S.E.2d at 598 n** (quoting *Packard Norfolk, 198 Va. at 563, 95 S.E.2d at 211–12*). The facts misrepresented or concealed must "substantially affect the interests of the person alleged to have been defrauded." *Packard Norfolk, 198 Va. at 563, 95 S.E.2d at 211*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

## Instruction No. 39.030
## Definition of Reliance

**Reliance is a belief that a representation is true which causes a person** [to take action he would not otherwise have taken; not to take action he otherwise would have taken]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Metrocall of Delaware, Inc. v. Continental Cellular Corp., 246 Va. 365, 374, 437 S.E.2d 189, 193–94 (1993)*; *Harris v. Dunham, 203 Va. 760, 767, 127 S.E.2d 65, 70 (1962)*; *DeJarnette v. Thomas M. Brooks Lumber Co., 199 Va. 18, 30, 97 S.E.2d 750, 758 (1957)*; *Masche v. Nichols, 188 Va. 857, 868, 51 S.E.2d 144, 148 (1949).*

### PRACTICE COMMENTARY

To establish fraud, "it is essential that the defrauded party demonstrates the right to reasonably rely upon the misrepresentation." *Metrocall of Delaware, Inc., 246 Va. at 374, 437 S.E.2d at 193–94.* This element is called "justifiable reliance." *Id.*

A representation may consist of words or conduct. See Instruction No. 39.050, Duty to Investigate, for further clarification of reliance.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.040**
**Definition of Constructive Fraud**

**Constructive fraud is a misrepresentation of a material fact, innocently or negligently made, with the intent that a person will rely on it and which that person relied upon with the result that he was damaged by it.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *SuperValu, Inc. v. Johnson, 276 Va. 356, 367–68, 666 S.E.2d 335, 341–42 (2008)*; *State Farm Mut. Auto. Ins. v. Remley, 270 Va. 209, 220, 618 S.E.2d 316, 321 (2005)*; *Prospect Dev. Co. v. Bershader, 258 Va. 75, 86, 515 S.E.2d 291, 297 (1999)*; *Blair Constr. v. Weatherford, 253 Va. 343, 346, 485 S.E.2d 137, 138 (1997)*; *Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)*; *Nationwide Mut. Ins. Co. v. Hargraves, 242 Va. 88, 92, 405 S.E.2d 848, 851 (1991)*; *Kitchen v. Throckmorton, 223 Va. 164, 171, 286 S.E.2d 673, 676 (1982)*; *Chandler v. Satchell, 160 Va. 160, 171, 168 S.E. 744, 748 (1933), aff'd, 164 Va. 318, 180 S.E. 313 (1935).*

## Practice Commentary

In *Kitchen, 223 Va. at 171, 286 S.E.2d at 676*, the Court applied the C.J.S. definition of constructive fraud:

> Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.

A transaction that an attorney in fact consummates to his own benefit involving the principal's assets, while acting as the principal's fiduciary, is subject to a presumption of constructive fraud. *Grubb v. Grubb, 272 Va. 45, 53–54, 630 S.E.2d 746, 751 (2006).*

When one party misrepresents a material fact to another who relies on it to his damage, a recovery is proper even if the misrepresentation was innocently made. *B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 315, 99 S.E.2d 606, 609 (1957); Chandler, 160 Va. at 171, 168 S.E. at 748; Schmelz Bros. Bankers v. Quinn, 134 Va. 78, 89, 113 S.E. 845, 848 (1922).*

Unfulfilled promises of future action, whether innocently or negligently made, are insufficient to support a constructive fraud claim. *SuperValu, Inc., 276 Va. at 367–368, 666 S.E.2d at 342* (overruling *Eden v. Weight, 265 Va. 398, 405, 578 S.E.2d 769, 773 (2003)* to the extent it implied that constructive fraud claims could be based on a present intent not to fulfill a promise of future action).

Prompt action is required by a deceived party when he discovers a misrepresentation amounting to constructive fraud. He will be deemed to have waived his right of repudiation if, after discovery of the fraud, he treats the contract as a subsisting obligation. The fact that the defrauded party knows his rights and intends to waive them must plainly appear. Mere delay by the deceived party does not amount to waiver if the delay results from a reasonable expectation that the wrongdoer will fulfill repeated assurances to take corrective action. *Link Assocs. v. Jefferson Standard Life Ins. Co., 223 Va. 479, 484–86, 291 S.E.2d 212, 215–16*

*(1982)*. Give Instruction No. 39.045 where the duty to take prompt action is an issue.

### *ALERTS:*

- Punitive damages may be recovered only where there is proof of actual malice. *Jordan v. Sauve, 219 Va. 448, 452–53, 247 S.E.2d 739, 741 (1978).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

## Instruction No. 39.045
## Duty to Take Prompt Action

**If a party discovers he has been defrauded, he has a duty to take reasonably prompt action to repudiate the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Link Assocs. v. Jefferson Standard Life Ins. Co., 223 Va. 479, 484–85, 291 S.E.2d 212, 215 (1982)*; *Employers Commercial Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 414, 200 S.E.2d 560, 563–64 (1973)*; *White v. Bott, 158 Va. 442, 458, 163 S.E. 397, 398 (1932)*; *Finch v. Garrett, 109 Va. 114, 116, 63 S.E. 417, 418 (1909).*

### PRACTICE COMMENTARY

Prompt action is required by the deceived party upon his discovery of misrepresentations amounting to constructive fraud. A party intending to repudiate a contract on the ground of fraud must act within a reasonable time and with great punctuality upon learning of the wrong. He will be deemed to have waived his right of repudiation if, after discovery of the fraud, he treats the contract as a subsisting obligation. But proof of waiver, usually a question for the trier of fact, must be clear. A waiver must be distinctly made with full knowledge of the rights waived; and the fact that the defrauded party knows his rights, and intends to waive them must plainly appear. Mere delay of the deceived party in rescinding a contract after learning of the fraud will not amount to waiver of the wrongful act, if the delay results from a reasonable expectation that the wrongdoer will fulfill the repeated assurances to grant the relief to which the plaintiff is entitled. *Link Assocs., 223 Va. at 485, 291 S.E.2d at 216.* See also *Management Enterprises, Inc. v. Thorncroft Co., 243 Va. 469, 474, 416 S.E.2d 229, 232 (1992)* (refusing to hold as a matter of law that party was precluded from seeking rescission of agreement because of laches and waiver).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.050**
**Duty to Investigate**

**A person to whom a misrepresentation was made has no duty to investigate unless he had or obtained information about the representation which would cause a reasonably prudent person to investigate.**

**If a person has a duty to investigate a representation and fails to investigate to the extent that a reasonably prudent person would, then he is bound by all knowledge that such an investigation of that representation would have disclosed.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Bergmueller v. Minnick, 238 Va. 332, 338, 383 S.E.2d 722, 725 (1989)*; *Nationwide Ins. Co. v. Patterson, 229 Va. 627, 631, 331 S.E.2d 490, 492 (1985)*; *Kuczmanski v. Gill, 225 Va. 367, 369, 302 S.E.2d 48, 50 (1983)*; *Armentrout v. French, 220 Va. 458, 466–67, 258 S.E.2d 519, 524 (1979)*; *Horner v. Ahern, 207 Va. 860, 863–64, 153 S.E.2d 216, 219 (1967)*; *Costello v. Larsen, 182 Va. 567, 571–72, 29 S.E.2d 856, 858 (1944).*

### Practice Commentary

This instruction is intended to be broad enough to encompass apparently conflicting case law in Virginia on this subject. The first paragraph reflects the general view that there is no duty to make an independent inquiry. The party making the misrepresentation should not be allowed to defend that conduct by claiming negligence on the part of the other party. *Nationwide, 229 Va. at 631, 331 S.E.2d at 492.* The last paragraph of the instruction states the duty to investigate completely, where an investigation is required, and clarifies the consequences of an incomplete investigation.

One who has made a partial investigation or who has had an equal opportunity to investigate may be duty bound to investigate fully. *Costello, 182 Va. at 571–72, 29 S.E.2d at 858; Harris v. Dunham, 203 Va. 760, 767–69, 127 S.E.2d 65, 69–71 (1962).* But see *Boykin v. Hermitage Realty, 234 Va. 26, 30, 360 S.E.2d 177, 178–79 (1987)* (holding that assurances to a buyer that an adjoining land parcel would remain undeveloped constituted actionable misrepresentations even if the buyer had access to the plan of development). The duty to investigate fully may also arise if one has information that would excite the suspicions of a reasonable person. Under the doctrine of *caveat emptor:*

> Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.

*Kuczmanski, 225 Va. at 369, 302 S.E.2d at 50 (quoting Horner, 207 Va. at 863–64, 153 S.E.2d at 219).* But a vendor who procures a sale by fraudulent misrepresentation may not invoke the doctrine of *caveat emptor. Boykin, 234 Va. at 30, 360 S.E.2d at 179.* Similarly, a seller "must not say or do anything to throw the purchaser off guard or to divert him from making the inquiries and examination which a prudent man ought to make." *Armentrout, 220 Va. at 466, 258 S.E.2d at 524*; *Horner, 207 Va. at 864, 153 S.E.2d at 219.*

Purchasers of real property bear the burden of discovering defects. *Van Deusen v. Snead, 247 Va. 324, 329, 441 S.E.2d 207, 210 (1994)*; *Watson v. Avon Street*

*Business Center, Inc., 226 Va. 614, 618, 311 S.E.2d 795, 798 (1984).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, Fraud & Deceit §§ 1 through 70

**Instruction No. 39.060**
**Fact Versus Opinion**

**To be liable, the defendant must make a misrepresentation of past or present fact[s]. Statements of opinion are not fraud.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. §§ 18.2-216, 59.1-68.3.

**CASE AUTHORITY:** *Sales v. Kecoughtan Hous. Co., 279 Va. 475, 481–82, 690 S.E.2d 91, 94–95 (2010)*; *Lambert v. Downtown Garage, Inc., 262 Va. 707, 712, 553 S.E.2d 714, 717 (2001)*; *McMillion v. Dryvit Sys., 262 Va. 463, 471–72, 552 S.E.2d 364, 368–69 (2001)*; *Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996)*; *Henry v. R.K. Chevrolet, Inc., 219 Va. 1011, 1012–1013, 254 S.E.2d 66, 67 (1979)*; *Packard Norfolk, Inc. v. Miller, 198 Va. 557, 562–63, 95 S.E.2d 207, 211 (1956)*; *Henning v. Kyle, 190 Va. 247, 252–53, 56 S.E.2d 67, 69 (1949)*.

### PRACTICE COMMENTARY

Neither an unfulfilled promise nor an opinion is fraud since such misrepresentations normally do not concern a past or present fact. See Instruction No. 39.010, Definition of Misrepresentation. But see *Boykin v. Hermitage Realty, 234 Va. 26, 29, 360 S.E.2d 177, 178–179 (1987)*; *Prospect Dev. Co. v. Bershader, 258 Va. 75, 85–86, 515 S.E.2d 291, 297 (1999)* (holding that repeated assurances to buyers of realty that an area of land near the property being purchased would remain undeveloped were under the circumstances of those cases, deliberate misrepresentations of existing facts). Whether a false representation constitutes an opinion or a fact must be judged on the facts of the case considering the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances. *Packard, 198 Va. at 562–63, 95 S.E.2d at 211.*

Commendatory statements, trade talk or puffing generally do not give rise to a fraud claim, as they are considered to be expressions of opinion that the listener has no right to rely upon. *Lambert, 262 Va. at 713, 553 S.E.2d at 717.*

☞ ***PRACTICE POINTER:*** The statutory references above and the *Henry* case deal with false advertising as a crime and as a basis for a civil action. Va. Code Ann. § 18.2-216 covers only non-oral advertisements. *Henry, 219 Va. at 1012–1014, 254 S.E.2d at 67–68.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, Fraud & Deceit §§ 1 through 70

**Instruction No. 39.070**
**Burden of Proof on Common Law Fraud: Clear and Convincing**

**The burden is on the party charging common law fraud to prove it by clear and convincing evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Gelber v. Glock, 293 Va. 497, 531, 800 S.E.2d 800, 819 (2017)*; *State Farm Mut. Auto Ins. v. Remley, 270 Va. 209, 218, 618 S.E.2d 316, 321 (2005)*; *Davis v. Marshall Homes, 265 Va. 159, 165, 576 S.E.2d 504, 506 (2003)*; *Henderson v. Henderson, 255 Va. 122, 126, 495 S.E.2d 496, 499 (1998)*; *Price v. Taylor, 251 Va. 82, 85, 466 S.E.2d 87, 88 (1996)*; *Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994).*

### PRACTICE COMMENTARY

The party alleging fraud, whether plaintiff or defendant, bears the burden of proof. *Gelber, 293 Va. at 531, 800 S.E.2d at 819*; *Ware v. Ware, 203 Va. 189, 194, 123 S.E.2d 357, 360 (1962)*; *Cook v. Hayden, 183 Va. 203, 209, 31 S.E.2d 625, 627 (1944).*

A number of cases describe the burden of proof necessary to establish a common law action for fraud as "clear, cogent, and convincing." *Patrick v. Summers, 235 Va. 452, 454, 369 S.E.2d 162, 164 (1988)*; *Carter v. Carter, 223 Va. 505, 509, 291 S.E.2d 218, 221 (1982)*; *Malbon v. Davis, 185 Va. 748, 755, 40 S.E.2d 183, 187 (1946).*

While a litigant must carry his burden to show a common law fraud in the procurement of a contract by clear and convincing evidence, the trial court must give the jury instruction on fraud unless the evidence is clearly insufficient to support the theory. *Price, 251 Va. at 85, 466 S.E.2d 88–89.*

The standard of proof is clear and convincing evidence whether actual or constructive fraud is involved. *Remley, 270 Va. at 218–20, 618 S.E.2d at 321; Davis, 265 Va. at 165, 576 S.E.2d at 506; Henderson, 255 Va. at 126, 495 S.E.2d at 499.* Instruction No. 3.110 defines clear and convincing evidence.

☞ ***PRACTICE POINTER:*** There is additional discussion on the burden of proof of damages in the Scope Note to this Chapter.

When bringing both a common law and Virginia Consumer Protection Act fraud claim, this instruction will need to be adapted to avoid confusion on the burdens of proof. *Ballagh v. Fauber Enters., 290 Va. 120, 127, 773 S.E.2d 366, 370 (2015).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.080**
**Factors that May Be Considered**

**In deciding whether fraud exists, you may take into consideration the relative knowledge of the parties, their respective motives and intentions, the closeness of their relationship, the actions of the parties, the nature and character of the transaction including the adequacy of the price, and all of the other surrounding facts and circumstances.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Payne v. Simmons, 232 Va. 379, 384, 350 S.E.2d 637, 640 (1986)*; *Creasy v. Henderson, 210 Va. 744, 750, 173 S.E.2d 823, 828 (1970)*; *Cook v. Hayden, 183 Va. 203, 209, 31 S.E.2d 625, 627 (1944)*; *Temple v. Jones, Son & Co., 179 Va. 286, 297–98, 19 S.E.2d 57, 62 (1942)*; *Barbour v. Barbour, 155 Va. 650, 653, 156 S.E. 365, 366 (1931).*

### Practice Commentary

Inadequacy of consideration is insufficient to constitute proof of fraud unless unfair advantage has been taken of a purchaser. But when the inadequacy of consideration is "so gross as to shock the conscience and astound the judgment of a man of common sense," then "it alone will create a presumption of fraud." *Lowe v. Trundle, 78 Va. 65, 69 (1883).* See also *Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 38–39, 597 S.E.2d 34, 42–43 (2004).*

Where a contract is made by a person of impaired mind or intelligence for an inadequate consideration, there is an inference that it was obtained by deception or undue influence and casts upon the other party the burden of showing its fairness. *Payne, 232 Va. at 384, 350 S.E.2d at 637.*

This instruction is intended to identify some circumstances courts have recognized may be relevant to an analysis of whether fraud occurred.

A relationship between two parties may call for closer scrutiny than is usually necessary in dealings between strangers. See *Carter v. Carter, 223 Va. 505, 291 S.E.2d 218 (1982)*; *Nicholson v. Shockey, 192 Va. 270, 276–80, 64 S.E.2d 813, 817–18 (1951)*; *Francisco v. Neel, 167 Va. 13, 18, 187 S.E. 495, 497–98 (1936).*

The instruction does not purport to address those occasions of self dealing by a fiduciary, where a presumption of constructive fraud arises under law, and where the burden of proof shifts to the fiduciary to produce clear and convincing evidence to rebut the presumption. *Grubb v. Grubb, 272 Va. 45, 53–54, 630 S.E.2d 746, 751 (2006)*; *Creasy, 210 Va. at 749–50, 173 S.E.2d at 828*; *Todd v. Sykes, 97 Va. 143, 146, 33 S.E. 517, 518–19 (1899).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, The law of Evidence in Virginia §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, Virginia Remedies, Chapter 19

Michie's Jurisprudence, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.090**
**Finding Instruction Common Law: Actual Fraud**

**You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:**

**(1) That the defendant misrepresented a material fact; and**

**(2) That the misrepresentation was made intentionally and knowingly; and**

**(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and**

**(4) That the plaintiff relied upon it; and**

**(5) That the plaintiff was damaged as a result.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Caperton v. A.T. Massey Coal Co., 285 Va. 537, 553, 740 S.E.2d 1, 9 (2013)*; *Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003)*; *Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)*; *Bryant v. Peckinpaugh, 241 Va. 172, 175, 400 S.E.2d 201, 203 (1991)*; *Packard Norfolk, Inc. v. Miller, 198 Va. 557, 561, 95 S.E.2d 207, 210 (1956)*; *Hicks v. Wynn, 137 Va. 186, 193, 119 S.E. 133, 135–36 (1923).*

### PRACTICE COMMENTARY

The elements of actual fraud are (1) a false representation; (2) of a material fact; (3) intentionally and knowingly made; (4) with the intent to mislead; (5) reliance by the party misled; and (6) resulting in damage to the party misled. *Evaluation Research Corp., 247 Va. at 148, 439 S.E.2d at 390.* The party claiming common law fraud must prove each element by clear and convincing evidence. See Instruction No. 39.070, Burden of Proof on Common Law Fraud: Clear and Convincing.

☞ ***PRACTICE POINTER:*** Punitive damages are allowed in cases involving actual fraud, provided that the party seeking such damages proves actual malice. *Jordan v. Sauve, 219 Va. 448, 452–53, 247 S.E.2d 739, 741 (1978).* See Instruction Nos. 9.080, General Punitive Damages and 9.090, Punitive Damages: Definition of Common Law Actual Malice.

### *ALERTS:*

- Use this finding instruction when only common law actual fraud is claimed. When only common law constructive fraud is claimed, use Instruction No. 39.100, Finding Instruction Common Law: Constructive Fraud. When both actual and constructive fraud are claimed, use Instruction No. 39.110, Finding Instruction Common Law: Actual and Constructive Fraud.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.100**
**Finding Instruction Common Law: Constructive Fraud**

**You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:**

**(1) That the defendant misrepresented a material fact; and**

**(2) That the misrepresentation was made innocently or negligently; and**

**(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and**

**(4) That the plaintiff relied upon it; and**

**(5) That the plaintiff was damaged as a result.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008)*; *Cohn v. Knowledge Connections, Inc., 266 Va. 362, 369, 585 S.E.2d 578, 582 (2003)*; *Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)*; *Wells v. Weston, 229 Va. 72, 77, 326 S.E.2d 672, 675 (1985)*; *Nuckols v. Nuckols, 228 Va. 25, 38, 320 S.E.2d 741, 738 (1984)*; *Union Trust Corp. v. Fugate, 172 Va. 82, 92, 200 S.E. 624, 628 (1939)*; *Chandler v. Satchell, 160 Va. 160, 171, 168 S.E. 744, 748 (1933)*.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- Use this instruction when only common law constructive fraud is claimed. When both common law actual and constructive fraud are claimed, use Instruction No. 39.110.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, *Fraud & Deceit* §§ 1 through 70

**Instruction No. 39.110**
**Finding Instruction Common Law: Actual and Constructive Fraud**

**You shall return your verdict for the plaintiff if he proved by clear and convincing evidence:**

**(1) That the defendant misrepresented a material fact; and**

**(2) That the misrepresentation was made intentionally and knowingly or it was made innocently or negligently; and**

**(3) That the misrepresentation was made with the intent that the plaintiff rely upon it; and**

**(4) That the plaintiff relied upon it; and**

**(5) That the plaintiff was damaged as a result.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008)*; *Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367–69, 585 S.E.2d 578, 581–82 (2003)*; *Henderson v. Henderson, 255 Va. 122, 126, 495 S.E.2d 496, 499 (1998)*; *Blair Constr. v. Weatherford, 253 Va. 343, 347–48, 485 S.E.2d 137, 139 (1997)*; *Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)*.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- This instruction is intended for use only in cases where both common law actual and constructive fraud are presented for the jury. When only actual fraud is involved, use Instruction No. 39.090, Finding Instruction Common Law: Actual Fraud. When only common law constructive fraud is involved, use Instruction No. 39.100, Finding Instruction Common Law: Constructive Law.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 19.1, 23.11

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 14.18, 24.06, 29.03, 35.01

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-18, 5-8, 19-5

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.23, 4.1, 4.9, 4.19

Kent Sinclair, VIRGINIA REMEDIES, Chapter 19

MICHIE'S JURISPRUDENCE, Fraud & Deceit §§ 1 through 70

# Chapter 40

# MISCELLANEOUS TORTS

## Scope Note


| | |
|---|---|
| **Instruction No. 40.100** | **Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues** |
| **Instruction No. 40.150** | **Wrongful or Tortious Interference with Contract Not Terminable at Will: Finding Instruction** |
| **Instruction No. 40.200** | **Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues** |
| **Instruction No. 40.250** | **Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Finding Instruction** |
| **Instruction No. 40.300** | **Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues** |
| **Instruction No. 40.350** | **Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction** |
| **Instruction No. 40.400** | **False Advertising (Va. Code Ann. § 18.2-216): Issues** |
| **Instruction No. 40.450** | **False Advertising (Va. Code Ann. § 18.2-216): Finding Instruction** |

# SCOPE NOTE

These instructions presently cover four torts:

1. wrongful or tortious interference with contract not terminable at will;
2. wrongful or tortious interference with contract expectancy, prospective business relationship or economic advantage, or contract terminable at will;
3. conspiracy to harm in a person's trade, business, or profession; and
4. statutory violations involving false advertising.

Instruction No. 40.100 sets forth the elements that the plaintiff must prove in order to recover for wrongful interference with a contract not terminable at will. *Perk v. Vector Res. Group, 253 Va. 310, 314–15, 485 S.E.2d 140, 143 (1997)*; *Chaves v. Johnson, 230 Va. 112, 120–21, 335 S.E.2d 97, 102–03 (1985)*. This instruction includes as an issue whether any interference by the defendant with the plaintiff's contract was justified, privileged, or not improper. Justification or privilege may include legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice. *Duggin v. Adams, 234 Va. 221, 229, 360 S.E.2d 832, 838 (1987)*. If the defendant has not raised this issue, this part of the instruction should be deleted.

Instruction No. 40.200 sets forth the elements that the plaintiff must prove in order to recover for wrongful or tortious interference with a contract expectancy, prospective business relationship or economic advantage, or contract terminable at will. *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 254 Va. 408, 413–14, 493 S.E.2d 375, 378 (1997)*; *Perk, 253 Va. at 314–15, 485 S.E.2d at 143*; see also *Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 300–01, 484 S.E.2d 892, 896 (1997)* (applying the elements of the tort). The Supreme Court of Virginia said in *Maximus*: "The virtual identity of interests and the legal ability to enforce those interests in a contract terminable at will and a contract or business expectancy lead to the conclusion that the level of protection afforded, and the elements of the cause of action, should also be the same. There is no basis to impose an additional requirement to differentiate the protection afforded to a contract terminable at will and to a contract or business expectancy." *254 Va. at 413–14, 493 S.E.2d at 378*. Accordingly, there is only one issue instruction for this tort and one finding instruction.

Instruction No. 40.200 includes as an issue whether any interference by the defendant with the plaintiff's contract expectancy, prospective business relationship or economic advantage, or contract terminable at will was justified, privileged, or not improper. If the defendant has not raised this issue, this part of the instruction should be deleted.

Instruction No. 40.300 sets forth the elements that the plaintiff must prove for a claim of conspiracy to harm the plaintiff in his trade, business, or occupation under Va. Code Ann. §§ 18.2-499 and 18.2-500. The plaintiff must prove by clear and convincing evidence that at least one conspirator acted with legal malice, that is, the defendant acted intentionally, purposefully, and without legal justification. *Simmons v. Miller, 261 Va. 561, 578, 544 S.E.2d 666, 676–77 (2001)*. However, the plaintiff is not required to prove that the conspirator's primary and overriding purpose was to injure the plaintiff in this trade or business. *Id., at 578, 544 S.E.2d at 677*. Moreover, the plaintiff is not required to prove actual malice. See *Commercial Bus. Sys. v. BellSouth Servs., 249 Va.*

*39, 47, 453 S.E.2d 261, 266–67 (1995)* (interpreting the statutes to require not personal spite but rather "proof of legal malice, i.e., that the interferer acted intentionally, purposefully, and without lawful justification"). If the plaintiff recovers, the damages are trebled, and the plaintiff is also entitled to recover a reasonable attorney's fee and costs. Va. Code Ann. § 18.2-500; *Advanced Marine Enters. v. PRC, Inc., 256 Va. 106, 125–26, 501 S.E.2d 148, 159–60 (1998)* (limiting recovery of costs to those that are "essential for prosecution of the suit" and finding an abuse of discretion in allowing recovery of other extraneous expenses).

Instruction No. 40.400 sets forth the elements that the plaintiff must prove for a statutory claim under Va. Code Ann. § 59.1-68.3. That statute allows an individual to bring a civil action for damages for violations of the criminal statutes found in Article 8, Chapter 6 of Title 18.2 involving misrepresentations and other offenses connected with sales, Va. Code Ann. § 18.2-214, *et seq.*, including for false advertising and violations of the Virginia Home Solicitation Sales Act, Va. Code Ann. § 59.1-21.1, *et seq.* To recover, the plaintiff must prove a loss. A plaintiff may recover either actual damages or the statutory de minimis amount along with reasonable attorney's fees. *Klaiber v. Freemason Assocs., 266 Va. 478, 487, 587 S.E.2d 555, 559 (2003).* Instruction No. 40.450 is the corresponding finding instruction. Both instructions have been prepared for a false advertisement claim under Va. Code Ann. § 18.2-216. The elements of the issues and corresponding finding instructions may be tailored, however, to fit cases involving a claimed violation of any of the other listed statutes.

Finding instructions for each of the above issues instructions are provided, respectively, in Instructions No. 40.150, 40.250, 40.350 and 40.450.

**Instruction No. 40.100**

**Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Was there a business expectancy or a valid contractual relationship between the plaintiff and** (name of third party)**; and**

(2) **Did the defendant know of this business expectancy or contractual relationship; and**

(3) **Did the defendant intentionally cause** (name of third party) **to** [breach; terminate] **the expectancy or relationship; and**

(4) **Was the plaintiff damaged by the** [breach; termination] **of the contract?**

**On these issues, the plaintiff has the burden of proof.**

**The defendant has alleged that any interference with the contract was justified, privileged, or not improper.**

**On this issue the defendant has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

***GOVERNING STATUTES*:** None.

***CASE AUTHORITY*:** *Collelo v. Geographic Servs., 283 Va. 56, 72–73, 727 S.E.2d 55, 62–63 (2012)*; *Lewis-Gale Med. Ctr., LLC v. Alldredge, 282 Va. 141, 149, 710 S.E.2d 716, 720 (2011)*; *Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558, 708 S.E.2d 867, 870 (2011)*; *DurretteBradshaw, P.C. v. MRC Consulting, L.C., 277 Va. 140, 145–47, 670 S.E.2d 704, 706–07 (2009)*; *Rappahannock Pistol and Rifle Club, Inc. v. Bennett, 262 Va. 5, 12, 546 S.E.2d 440, 443–44 (2001)*; *Perk v. Vector Res. Group, Ltd., 253 Va. 310, 314, 485 S.E.2d 140, 143 (1997)*; *Century-21 v. Elder, 239 Va. 637, 641–42, 391 S.E.2d 296, 298–99 (1990)*; *Duggin v. Adams, 234 Va. 221, 226, 360 S.E.2d 832, 835–36 (1987)*; *Chaves v. Johnson, 230 Va. 112, 120–21, 335 S.E.2d 97, 102 (1985).*

### PRACTICE COMMENTARY

As to damages, see Instructions No. 45.500, Damages: Direct, et seq.

In order for a plaintiff who is not a party to the contract in question to sufficiently state a cause of action for tortious interference with a contract, he must plead that the injuring party either intended to affect the specific contract or acted with a purpose to interfere with that contract. It is not sufficient to simply allege that the injuring party knew of the contract and induced a party to break it. *DurretteBradshaw, P.C., 277 Va. at 146–47, 670 S.E.2d at 707.*

The instruction includes as an issue whether any interference by the defendant with the plaintiff's contract was justified, privileged, or not improper. Justification or privilege may include legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice. *Duggin, 234 Va. at 229, 360 S.E.2d at 838* (citing *Chaves, 230 Va. at 121, 335 S.E.2d at 103*). If the defendant has not raised the issue, this part of the instruction should be deleted.

### *ALERTS:*

- This instruction should be used only when the contract is not terminable at will. If the contract is terminable at will, see, Instruction No. 40.250, Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Finding Instruction.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.19, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 20

MICHIE'S JURISPRUDENCE, Conspiracy § 2, 12; Contracts §§ 58, 71, 78, 92; Limitation of Actions § 10; Master and Servant § 7; Torts §§ 2, 2.1, 2.2

**Instruction No. 40.150**
**Wrongful or Tortious Interference with Contract Not Terminable at Will: Finding Instruction**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence**:

(1) **that there was a business expectancy or a valid contractual relationship between the plaintiff and** (name of third party)**; and**

(2) **that the defendant knew of this business expectancy or contractual relationship; and**

(3) **that the defendant intentionally interfered and caused the** [breach; termination] **of the expectancy or relationship; and**

(4) **that the plaintiff was damaged by the** [breach; termination]**.**

**You shall find your verdict for the defendant if: (1) the plaintiff failed to prove any one or more of these elements; or (2) the defendant proved by the greater weight of the evidence that the interference was justified, privileged, or not improper.**

## SOURCES & AUTHORITY

***GOVERNING STATUTES*:** None.

***CASE AUTHORITY*:** *Collelo v. Geographic Servs., Inc., 283 Va. 56, 72–73, 727 S.E.2d 55, 62–63 (2012)*; *Lewis-Gale Med. Ctr., LLC v. Alldredge, 282 Va. 141, 149, 710 S.E.2d 716, 720 (2011)*; *Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558–60, 708 S.E.2d 867, 870 (2011)*; *DurretteBradshaw, P.C. v. MRC Consulting, L.C., 277 Va. 140, 145–47, 670 S.E.2d 704, 706–07 (2009)*; *Rappahannock Pistol and Rifle Club, Inc. v. Bennett, 262 Va. 5, 12, 546 S.E.2d 440, 443–44 (2001)*; *Perk v. Vector Res. Group, Ltd., 253 Va. 310, 314, 485 S.E.2d 140, 143 (1997)*; *Century-21 v. Elder, 239 Va. 637, 641–42, 391 S.E.2d 296, 298–99 (1990)*; *Duggin v. Adams, 234 Va. 221, 226, 360 S.E.2d 832, 835–36 (1987)*; *Chaves v. Johnson, 230 Va. 112, 120–21, 335 S.E.2d 97, 102–03 (1985)*.

### PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 40.100, Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues.

### *ALERTS:*

- See Alerts to Instruction No. 40.100, Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.19, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 20

MICHIE'S JURISPRUDENCE, Conspiracy § 2, 12; Contracts §§ 58, 71, 78, 92; Limitation of Actions § 10; Master and Servant § 7; Torts §§ 2, 2.1, 2.2

**Instruction No. 40.200**
**Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Was there a** [contract expectancy; prospective business relationship; economic advantage; contract] **between the plaintiff and** (name of third party); **and**

(2) **Did the defendant know of this** [contract expectancy; prospective business relationship; economic advantage; contract]**; and**

(3) **Did the defendant use improper methods to interfere with the** [contract expectancy; prospective business relationship; economic advantage; contract]**; and**

(4) **Did the defendant intend to interfere with the** [contract expectancy; prospective business relationship; economic advantage; contract]**; and**

(5) **Was it reasonably certain that** [the business relationship would have continued; the expectancy would have been realized; the economic advantage would have been realized; the contract would have continued] **in the absence of the defendant's conduct; and**

(6) **Did the defendant's interference with the** [contract expectancy; prospective business relationship; economic advantage; contract] **cause damage to the plaintiff?**

**On these issues, the plaintiff has the burden of proof.**

**The defendant has alleged that any interference with the** [contract expectancy; prospective business relationship; economic advantage; or contract] **was justified, privileged, or not improper.**

**On these issues, the defendant has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Schaecher v. Bouffault, 290 Va. 83, 106, 772 S.E.2d 589, 602 (2015)*; *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 403–04, 732 S.E.2d 676, 688 (2012)*; *Lewis-Gale Med. Ctr., LLC v. Alldredge, 282 Va. 141, 149–53, 710 S.E.2d 716, 720–22 (2011)*; *Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558–60, 708 S.E.2d 867, 870–71 (2011)*; *Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 289, 576 S.E.2d 752, 757 (2003)*; *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 254 Va. 408, 414, 493 S.E.2d 375, 379 (1997)*; *Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 300–01, 484 S.E.2d 892, 896 (1997)*.

## Practice Commentary

The instruction includes as an issue whether any interference by the defendant with the plaintiff's contract expectancy, prospective business relationship or economic advantage, or contract terminable at will was justified, privileged, or not improper. If the defendant has not raised that issue, it should be deleted from the instruction.

***Improper methods***—The Supreme Court of Virginia has cautioned that "the law will not provide relief to every disgruntled player in the rough-and-tumble world comprising the competitive marketplace." *Williams, 265 Va. at 290, 576 S.E.2d at 758.*

> The fact that Virginia recognizes the existence of the tort of intentional interference with a contract does not mean that every contract relationship which is terminated or disputed through the interference of a third party promoting its own interests will result in tort liability for that party. Rather, the law provides a remedy in tort only where the plaintiff can prove that the third party's actions were illegal or fell so far outside the accepted practice of that "rough-and-tumble world" as to constitute improper methods.

*Lewis-Gale Med. Ctr., LLC, 282 Va. at 153, 710 S.E.2d at 722.*

The improper methods that a plaintiff must prove to establish wrongful interference with contract expectancy include violations of statutes, regulations, or recognized common law rules. Examples include violence, threats, intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of confidential information, and a breach of fiduciary duty. *Duggin v. Adams, 234 Va. 221, 227–28, 360 S.E.2d 832, 836–37 (1987).* Improper conduct also includes unfair competition or unethical conduct. *Id. at 228, 360 S.E.2d at 837*; *Maximus, Inc., 254 Va. at 414, 493 S.E.2d at 379.* An instruction may be given on the elements of the independent tort or illegality alleged to have constituted the improper method.

While "improper methods or means need not be inherently illegal or tortious, the breach of a noncompete clause is not in itself an improper method or means." *Preferred Sys. Solutions, 284 Va. at 404, 732 S.E.2d at 688.*

***Intent requirement***—While "the interferor's knowledge of the business relationship and his intent to disturb it are requisite elements [of a claim for tortious interference with a contract expectancy]; malice is not." *Chaves v. Johnson, 230 Va. 112, 120–21, 335 S.E.2d 97, 102–03 (1985).* In fact, the Supreme Court of Virginia has declined to "extend the scope of the tort to include actions solely motivated by spite, ill will, or malice." *Dunn, McCormack & MacPherson, 281 Va. at 560, 708 S.E.2d at 870–71.*

***Objective test***—Mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action. The plaintiff must meet an objective test. Proof of subjective expectations will not suffice. Moreover, the plaintiff must establish a "probability" of future economic benefit. Proof of a "possibility" that such benefit will accrue is insufficient. *Commercial Bus. Sys., 253 Va. at 301, 484 S.E.2d at 897.*

***Punitive damages***—In commercial tort cases, punitive damages may be awarded only if the acts are done with malice or wantonness. *Simbeck, Inc. v. Dodd Sisk Whitlock Corp., 257 Va. 53, 58–59, 508 S.E.2d 601, 604 (1999).*

***Relationship to a business conspiracy claim***—The Supreme Court of Virginia has held that "causes of action for tortious interference with contract and tortious interference with business expectancy qualify as the requisite unlawful act to proceed on a business conspiracy claim under Va. Code Ann. §§ 18.2-499 and 18.2-500 because both claims are predicated on an independent common law duty arising outside of contract." *Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 211, 754 S.E.2d 313, 316 (2014)*; see also Instruction No. 40.300, Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues and Instruction No. 40.350, Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction.

☞ ***PRACTICE POINTER:*** As to damages, see Instructions No. 45.500, Damages: Direct, et. seq.

### ***ALERTS:***

- This instruction should not be used when the cause of action alleges wrongful or tortious interference with a contract not terminable at will. See Instruction No. 40.100, Wrongful or Tortious Interference with Contract Not Terminable at Will: Issues.

- The instruction uses the term "contract" rather than "contract terminable at will." The circumstances of the case may require use of the term "contract terminable at will."

- Prior versions of this instruction originally had seven elements. However, for clarity and simplification, previous element (2) was removed. That element stated, "(2) Was there a reasonable probability of future economic benefit to the plaintiff from the contract expectancy [prospective business relationship; economic advantage; or contract][?]" In most cases, the reasonable probability of future economic

benefit should be present as it is inconsistent with one's self-interest to enter into purely speculative or unprofitable enterprises. However, there may be circumstances where the heart of the defendant's claim is that the plaintiff's expectancy was unprofitable or unreasonably speculative. Where appropriate, the court may include that element as part of its instruction.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.19, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 20

MICHIE'S JURISPRUDENCE, Conspiracy § 2, 12; Contracts §§ 58, 71, 78, 92; Limitation of Actions § 10; Master and Servant § 7; Torts §§ 2, 2.1, 2.2

**Instruction No. 40.250**
**Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Finding Instruction**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:**

(1) **that there was a** [contract expectancy; prospective business relationship; economic advantage; contract] **between the plaintiff and** (name of third party)**; and**

(2) **that the defendant knew of this** [contract expectancy; prospective business relationship; economic advantage; contract]**; and**

(3) **that the defendant used improper methods to interfere with the** [contract expectancy; prospective business relationship; economic advantage; contract]**; and**

(4) **that the defendant intended to interfere with the [contract expectancy;** prospective business relationship; economic advantage; contract]**; and**

(5) **that it was reasonably certain that** [the business relationship would have continued; the expectancy would have been realized; the economic advantage would have been realized; the contract would have continued] **in the absence of the defendant's conduct; and**

(6) **that the plaintiff was damaged by the disruption of the** [contract expectancy; prospective business relationship; economic advantage; contract]**.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of these elements; or if you find that the defendant proved by the greater weight of the evidence that the interference was justified, privileged or not improper.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Schaecher v. Bouffault, 290 Va. 83, 106, 772 S.E.2d 589, 602 (2015)*; *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 403–04, 732 S.E.2d 676, 688 (2012)*; *Lewis-Gale Med. Ctr., LLC v. Alldredge, 282 Va. 141, 149–53, 710 S.E.2d 716, 720–22 (2011)*; *Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 558–60, 708 S.E.2d 867, 870–71 (2011)*; *Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 289, 576 S.E.2d 752, 757 (2003)*; *Simbeck, Inc. v. Dodd Sisk Whitlock Corp., 257 Va. 53, 58–59, 508 S.E.2d 601, 604 (1999)*; *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 254 Va. 408, 414, 493 S.E.2d 375, 379 (1997)*; *Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 300–01, 484 S.E.2d 892, 896 (1997)*.

### PRACTICE COMMENTARY

See Practice Commentary to Instruction No. 40.200, Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues.

### *ALERTS:*

- See Alerts to Instruction No. 40.200, Wrongful or Tortious Interference With Contract Expectancy (Contract Terminable at Will); Prospective Business Relationship, or Economic Advantage; Contract: Issues.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 26.19, 35.01

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Kent Sinclair, VIRGINIA REMEDIES, Chapter 20

MICHIE'S JURISPRUDENCE, Conspiracy § 2, 12; Contracts §§ 58, 71, 78, 92; Limitation of Actions § 10; Master and Servant § 7; Torts §§ 2, 2.1, 2.2

**Instruction No. 40.300**

**Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Did** [the defendants; the defendant and at least one other person; (names of conspirators)] **act in concert, agree, associate, mutually undertake or combine together;**

(2) **Did they intentionally, purposefully, and without lawful justification injure the plaintiff's** [reputation; trade; business; profession]**; and**

(3) **Did the plaintiff suffer damages as a result of the acts of** [this defendant; these defendants; (names of conspirators)]**?**

(4) **If the plaintiff is entitled to recover, what is the amount of plaintiff's damages?**

**On these issues, the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 18.2-499, 18.2-500.

**Case Authority:** *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC, 294 Va. 243, 256–57, 805 S.E.2d 399, 405–06 (2017)*; *Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 211, 214–18, 754 S.E.2d 313, 315, 317–20 (2014)*; *Station # 2, LLC v. Lynch, 280 Va. 166, 173–75, 695 S.E.2d 537, 541–42 (2010)*; *Syed v. ZH Techs., Inc., 280 Va. 58, 72–73, 694 S.E.2d 625, 633 (2010)*; *Saks Fifth Avenue, Inc. v. James, Ltd., 272 Va. 177, 189–91, 630 S.E.2d 304, 311–13 (2006)*; *Ulloa v. QSP, Inc., 271 Va. 72, 78 n.1, 624 S.E.2d 43, 47 n.1 (2006)*; *Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 289–90, 576 S.E.2d 752, 757 (2003)*; *Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 676–77 (2001); *Feddeman & Co. v. Langan Assocs., 260 Va. 35, 44–46, 530 S.E.2d 668, 673–75 (2000)*; *Advanced Marine Enters. v. PRC, Inc., 256 Va. 106, 117–18, 501 S.E.2d 148, 154–55 (1998)*; *Charles E. Brauer Co., Inc. v. NationsBank of Virginia, 251 Va. 28, 35–36, 466 S.E.2d 382, 386–87 (1996)*; *Commercial Bus. Sys. Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 46–47, 453 S.E.2d 261, 266–67 (1995)*; *CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 27–28, 431 S.E.2d 277, 281–82 (1993)*; *Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 107–09, 413 S.E.2d 611, 618–19 (1992)*; *Allen Realty Corp. v. Holbert, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984).*

## Practice Commentary

A jury finding of conspiracy without a finding of damages is contrary to the jury instruction and invalid as a matter of law. *Ulloa, 271 Va. at 78 n.1, 624 S.E.2d at 47 n.1.* The jury must find compensatory damages in order for liability under Va. Code Ann. § 18.2-500 to be established. *Syed, 280 Va. at 73–75, 694 S.E.2d at 634.*

Va. Code Ann. §§ 18.2-499 and 18.2-500 do *not* require plaintiff to prove actual malice. Although Va. Code § 18.2-499 employs the phrase "willfully and maliciously," these statutes merely require proof of legal malice, that is, proof that the defendant acted "intentionally, purposefully, and without lawful justification." Element (2) of this instruction adopts those terms rather than the statutory terms. *Advanced Marine Enters., 256 Va. at 117, 501 S.E.2d at 154–55*; *Commercial Bus. Sys., 249 Va. at 47, 453 S.E.2d at 266–67*; *Worrie v. Boze, 198 Va. 533, 543, 95 S.E.2d 192, 200 (1956)* ("In those jurisdictions where an action for conspiracy to breach a contract is allowable, the authorities agree that exemplary or punitive damages in addition to compensatory damages may be awarded if the act is done with malice or wantonness.").

It is *not* required that the plaintiff prove that a conspirator's primary and overriding purpose was to injure another in his trade or business. *Commercial Bus. Sys., 249 Va. at 47, 453 S.E.2d at 267* ("[I]n any event, we do not think that, as a general proposition, the conspiracy statutes require proof that a conspirator's primary and overriding purpose is to injure another in his trade or business. The statutes do not so provide, and such a requirement would place an unreasonable burden on a plaintiff.").

A conspiracy merely to breach a contract that does not involve an independent duty arising outside the contract is insufficient to establish a civil claim under Va. Code Ann. § 18.2-500. *Station # 2, LLC v. Lynch, 280 Va. at 174, 695 S.E.2d at 541.*

Tortious interference with contract or business expectancy may serve as the predicate unlawful act for a conspiracy claim under Va. Code Ann. §§ 18.2-499 and 18.2-500. See *Dunlap, 287 Va. at 211, 754 S.E.2d at 315.*

"One of the requirements for recovery under the statute is a showing that two or more persons combined or acted in concert." *Charles E. Brauer Co., 251 Va. at 36, 466 S.E.2d at 386–87.* "[A] single entity cannot conspire with itself." *Id. at 36, 466 S.E.2d at 387.* A principal and an agent "are not separate persons for purposes of the conspiracy statute." *Id.*

Va. Code Ann. §§ 18.2-499 and 18.2-500 do not apply to personal or employment interests. *Andrews v. Ring, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003).* In addition, there is no actionable claim for conspiracy to effect a fraudulent conveyance. *La Bella Dona Skin Care, Inc., 294 Va. at 256, 805 S.E.2d at 405–06.*

There is no reported Virginia case applying Va. Code Ann. § 18.2-499(A)(ii). In instructing in such a case, paragraph (2) of this Instruction is recommended to be modified to read: "(2) Did they intentionally, purposely, and without lawful justification compel plaintiff to do or perform any act against his will, or prevent or hinder plaintiff from doing or performing any lawful act." *Dunlap, 287 Va. at 215, 754 S.E.2d at 317.* Paragraph (2) of the finding instruction for this tort, Instruction No. 40.350, Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction, similarly will need to be modified.

The Wine Franchise Act does not prohibit a statutory conspiracy action based upon conduct declared wrongful by the Act. *Country Vintner, Inc. v. Louis Latour, Inc., 272 Va. 402, 412–15, 634 S.E.2d 745, 751–52 (2006)* (holding Va. Code Ann. §§ 18.2-499 and 18.2-500 are not preempted by the Wine Franchise Act, Va. Code Ann. § 4.1-400 et seq.).

This instruction addresses statutory conspiracy under Va. Code Ann. §§ 18.2-499 and 18.2-500 to harm someone in their trade, business or occupation. This statutory tort exists alongside the common law tort of conspiracy. See *CaterCorp, Inc., 246 Va. at 28, 431 S.E.2d at 281–82.* For a discussion of common law conspiracy, see *Gelber v. Glock, 293 Va. 497, 533–35, 800 S.E.2d 800, 820–22 (2017).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.19

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1 through 8, 12, 13

**Instruction No. 40.350**
**Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Finding Instruction**

**You shall find your verdict for the plaintiff if plaintiff has proven by clear and convincing evidence:**

(1) **That** [defendants; defendant and at least one other person; (names of conspirators)] **acted in concert, agreed, associated, mutually undertook or combined together;**

(2) **That they intentionally, purposefully, and without lawful justification injured the plaintiff's** [reputation; trade; business; profession]**; and**

(3) **That plaintiff suffered damages as a result of these acts.**

**You shall find your verdict for the defendant if the plaintiff failed to prove any one or more of these elements.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES**: Va. Code Ann. §§ 18.2-499, 18.2-500.

**CASE AUTHORITY**: *La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC, 294 Va. 243, 256–57, 805 S.E.2d 399, 405–06 (2017)*; *Dunlap v. Cottman Transmission Sys., LLC, 287 Va. 207, 211, 214–18, 754 S.E.2d 313, 315, 317–20 (2014)*; *Station # 2, LLC v. Lynch, 280 Va. 166, 173–75, 695 S.E.2d 537, 541–42 (2010)*; *Syed v. ZH Techs., Inc., 280 Va. 58, 72–73, 694 S.E.2d 625, 633 (2010)*; *Saks Fifth Avenue, Inc. v. James, Ltd., 272 Va. 177, 189–91, 630 S.E.2d 304, 311–13 (2006)*; *Ulloa v. QSP, Inc., 271 Va. 72, 78 n.1, 624 S.E.2d 43, 47 n.1 (2006)*; *Williams v. Dominion Tech. Partners, LLC, 265 Va. 280, 289–90, 576 S.E.2d 752, 757 (2003)*; *Simmons v. Miller, 261 Va. 561, 578, 544 S.E.2d 666, 676–77 (2001)*; *Feddeman & Co. v. Langan Assocs., 260 Va. 35, 44–46, 530 S.E.2d 668, 673–75 (2000)*; *Advanced Marine Enters. v. PRC, Inc., 256 Va. 106, 117–18, 501 S.E.2d 148, 154–55 (1998)*; *Charles E. Brauer Co., Inc. v. NationsBank of Virginia, 251 Va. 28, 35–36, 466 S.E.2d 382, 386–87 (1996)*; *Commercial Bus. Sys. Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 46–47, 453 S.E.2d 261, 266–67 (1995)*; *CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 27–28, 431 S.E.2d 277, 281–82 (1993)*; *Tazewell Oil Co. v. United Virginia Bank, 243 Va. 94, 107–09, 413 S.E.2d 611, 618–19 (1992)*; *Allen Realty Corp. v. Holbert, 227 Va. 441, 448–49, 318 S.E.2d 592, 596 (1984)*.

### PRACTICE COMMENTARY

See Practice Commentary to Instruction 40.300, Conspiracy to Harm in Trade, Business or Profession (Va. Code Ann. §§ 18.2-499 and 18.2-500): Issues. As noted in that Practice Commentary, if a claim is based on an alleged violation of Va. Code Ann. § 18.2-499(A)(ii), paragraph (2) of this instruction also will need to be modified.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.26

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 26.19

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1 through 8, 12, 13

**Instruction No. 40.400**
**False Advertising (Va. Code Ann. § 18.2-216): Issues**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

(1) **Did the defendant intend to sell or otherwise dispose of** [merchandise; securities; service; land; lot; (name or describe other property)]**?**

(2) **Did the defendant cause to be** [made; published; disseminated; circulated; placed before the public] **in a** [newspaper; book; notice; pamphlet; letter; or other form of communication] **an advertisement of any sort regarding such** [merchandise; securities; service; land; lot; (name or describe other property)]**?**

(3) **Did that advertisement contain a** [promise; assertion; representation; statement of fact] **which was untrue, deceptive or misleading?**

(4) **Did the plaintiff suffer a loss as a result of the defendant's acts?**

(5) **If the plaintiff is entitled to recover, what is the amount of damages?**

**On these issues, the plaintiff has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 18.2-216, 59.1-68.3.

**CASE AUTHORITY:** *Klaiber v. Freemason Assocs., 266 Va. 478, 486–87, 587 S.E.2d 555, 559 (2003).*

### PRACTICE COMMENTARY

Va. Code Ann. § 59.1-68.3 establishes an individual civil action permitting the recovery of damages and attorneys' fees for any person who suffers loss as the result of a violation of Article 8 (§ 18.2-214 et seq.), Chapter 6 of Title 18.2. Although this instruction pertains only to "False Advertising" as proscribed by Va. Code Ann. § 18.2-216, it may serve as a guide for drafting an instruction applicable to any of the other conduct proscribed in Article 8 (Misrepresentations and Other Offenses Connected with Sales), Chapter 6 (Crimes Involving Fraud).

A statutory cause of action for false advertising is not analogous to a common law fraud claim. *Klaiber, 266 Va. at 487, 587 S.E.2d at 559.*

The limitation period for a claim of false advertisement is prescribed in Va. Code Ann. § 8.01-248. *McMillion v. Dryvit Sys., 262 Va. 463, 467, 552 S.E.2d 364, 366 (2001)*; *Parker-Smith v. Sto Corp., 262 Va. 432, 438–40, 551 S.E.2d 615, 618–19 (2001).*

A plaintiff must suffer "loss" to recover damages either actual or the statutory *de minimis* amount. *Klaiber, 266 Va. at 487, 587 S.E.2d at 559.*

"The methods, devices and practices prohibited . . . are non-oral methods, devices and practices." *Henry v. R.K. Chevrolet, Inc., 219 Va. 1011, 1014, 254 S.E.2d 66, 68 (1979).* "Had the General Assembly intended to reach an individual seller's oral untrue, deceptive or misleading statements, it would have said so in clearer language." *Id.*

Section 59.1-68.3 also provides a cause of action for violation of the Virginia Home Solicitation Sales Act, Va. Code Ann. § 59.1-21.1 et seq. A violation of this Act also constitutes a prohibited practice pursuant to § 59.1-200 of the Virginia Consumer Protection Act. See Va. Code Ann. 59.1-21.7:1.

As a general rule, the burden of proof in civil matters is "by a preponderance of the evidence." *In re Phillips, 296 Va. 433, 445, 822 S.E.2d 1, 7 (2018).* "The requirement of proof by clear and convincing evidence generally is limited to certain cases that are equitable in nature, such as suits involving fraud and misrepresentation, undue influence, estoppel, and requests for the imposition of constructive and resulting trusts." *RF & P Corp. v. Little, 247 Va. 309, 318, 440 S.E.2d 908, 914 (1994).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.23, 3.2

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.01

Kent Sinclair, VIRGINIA REMEDIES §§ 19-2, 43-8, 65-1, 74-3, 74-6

MICHIE'S JURISPRUDENCE, Commercial Law §§ 34, 36; False Pretenses and Cheats § 5; Fraud and Deceit § 10; Trademarks, Trade Names and Unfair Competition §§ 4.2, 5

**Instruction No. 40.450**
**False Advertising (Va. Code Ann. § 18.2-216): Finding Instruction**

**You shall find your verdict for the plaintiff if he proved by the greater weight of the evidence:**

(1) **that the defendant intended to sell or otherwise dispose of** [merchandise; securities; service; land; lot; (name or described other property)]**;**

(2) **that the defendant caused to be** [made; published; disseminated; circulated; placed before the public] **in a** [newspaper; book notice; pamphlet; letter; or other form of communication] **an advertisement of any sort regarding such** [merchandise; securities; service; land; lot; (name or describe other property)]**;**

(3) **that the advertisement contained a** [promise; assertion; representation; statement of fact] **which was untrue, deceptive or misleading; and**

(4) **that the plaintiff suffered a loss as a result.**

**You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 18.2-216, 59.1-68.3.

**CASE AUTHORITY:** *Klaiber v. Freemason Assocs., 266 Va. 478, 486–87, 587 S.E.2d 555, 559 (2003).*

### PRACTICE COMMENTARY

See Practice Commentary for Instruction No. 40.400, False Advertising (Va. Code Ann. § 18.2-216): Issues.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.23, 3.2

Charles E. Friend and Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 35.01

Kent Sinclair, VIRGINIA REMEDIES §§ 19-2, 43-8, 65-1, 74-3, 74-6

MICHIE'S JURISPRUDENCE, Commercial Law §§ 34, 36; False Pretenses and Cheats § 5; Fraud and Deceit § 10; Trademarks, Trade Names and Unfair Competition §§ 4.2, 5

# Chapter 41

# MALICIOUS PROSECUTION

## Scope Note

**Instruction No. 41.000** **Definition of Malicious Prosecution**

**Instruction No. 41.010** **Instituting Criminal Proceedings**

**Instruction No. 41.020** **Definition of Malice**

**Instruction No. 41.035** **Lack of Malice**

**Instruction No. 41.040** **Definition of Probable Cause**

**Instruction No. 41.050** **Probable Cause**

**Instruction No. 41.070** **Probable Cause: Willful Concealment or Shoplifting**

**Instruction No. 41.080** **Probable Cause: Advice of Counsel**

**Instruction No. 41.110** **Elements Stipulated or Proved as a Matter of Law**

**Instruction No. 41.130** **Finding Instruction: General**

**Instruction No. 41.135** **Issues and Allocation of Burdens of Proof—Where Defendant Is a Merchant**

**Instruction No. 41.136** **Finding Instruction: Where Defendant Is a Merchant**

**Instruction No. 41.140** **Compensatory Damages**

**Instruction No. 41.150** **Punitive Damages**

# SCOPE NOTE

Instruction No. 41.000 defines malicious prosecution as the institution of criminal proceedings maliciously and without probable cause if the criminal proceeding is terminated not unfavorably to the person prosecuted. In this context, Instruction No. 41.010 defines "instituting criminal proceedings," Instruction No. 41.020 defines "malice," and Instruction No. 41.040 defines "probable cause."

Malicious prosecution actions arising from criminal proceedings are not favored in Virginia, and the requirements for maintaining such actions are more stringent than those applied to other tort cases. The reason for this disfavor is that criminal prosecutions are essential for maintaining an orderly society and people should not be discouraged from bringing such actions out of fear of subsequent civil proceedings against them. *Lewis v. Kei, 281 Va. 715, 722–23, 708 S.E.2d 884, 889 (2011)*; *O'Connor v. Tice, 281 Va. 1, 7, 704 S.E.2d 572, 575 (2011)*; *Pallas v. Zaharopoulos, 219 Va. 751, 754, 250 S.E.2d 357, 359 (1979).*

For jury comprehension and because most malicious prosecution suits are brought after an acquittal, the instructions use the word "favorable" when referring to the termination of the criminal proceeding; the words "not unfavorable" are offered as a bracketed alternative. What constitutes a termination not unfavorable to the plaintiff is discussed in 12A M.J., *Malicious Prosecution* § 14; 52 Am. Jur. 2d *Malicious Prosecution* §§ 29–44; 54 C.J.S. *Malicious Prosecution* §§ 54–60. Basically, any final resolution other than a guilty verdict, a judgment of guilt, or a bargained plea is a resolution not unfavorable to the present plaintiff.

While a not unfavorable resolution is essential to the plaintiff, evidence of such a resolution is not evidence of a malicious prosecution. The important question is whether the defendant had probable cause to bring the criminal proceeding, not whether the plaintiff was convicted. Instructions Nos. 41.035 and 41.050 emphasize that either lack of malice or existence of probable cause will defeat a malicious prosecution action even if the other exists and even if the present plaintiff prevailed in the criminal proceeding. Also, the defendant may offer proof that the plaintiff was guilty in fact even though he was acquitted. *Horne v. Bridwell, 193 Va. 381, 389, 68 S.E.2d 535, 540 (1952)*; *Blanks v. Gordon, 202 Va. 295, 297–299, 117 S.E.2d 82, 84–85 (1960)*; *Stanley v. Webber, 260 Va. 90, 97, 531 S.E.2d 311, 315 (2000)*; *Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 589, 594 S.E.2d 915, 917 (2004).*

Instruction No. 41.135 addresses the issues and burdens of proof where the defendant is a merchant, and Instruction No. 41.136 is a finding instruction to be used in such cases. Instruction No. 41.070 presents the merchant's defense of probable cause. *See* Va. Code Ann. § 8.01-226.9 and *Tweedy v. J.C. Penney Co., 216 Va. 596, 600, 221 S.E.2d 152, 155–156 (1976). Tweedy* assigns the burden of proof on that defense to the merchant. The inherent inconsistency between this instruction, which requires the merchant to prove that he had probable cause, and the definition of malicious prosecution, which requires the plaintiff to show that the criminal action was instituted without probable cause, is discussed in the Practice Commentary to Instruction No. 41.070.

Advice of counsel can be a defense to a malicious prosecution suit; Instruction No. 41.080 covers this topic.

Instruction No. 41.130 is a general finding instruction. Instruction No. 41.110 adapts a general finding instruction to the situation where the institution of the criminal proceeding and its termination not unfavorably to the tort plaintiff are uncontested. Instruction No. 41.136 is a finding instruction that applies where the defendant is a merchant.

Instruction No. 41.140 sets forth the compensatory damages that a jury may award a plaintiff. As explained in Instruction No. 41.150, a jury may award the plaintiff punitive damages if it finds that the defendant acted with actual malice in instituting the criminal proceeding. This instruction defines actual malice as a sinister or corrupt motive such as hatred, personal spite, ill will, a desire to injure the plaintiff, or a conscious disregard of the rights of others.

In a malicious prosecution case involving a bad check, Va. Code Ann. § 18.2-185 provides that there is a presumption of probable cause when the actions of the person arresting or causing an arrest complied with the statutory conditions. Under Va. Code Ann. § 8.01-226.10, a person who arrested or caused the arrest and prosecution of the drawer shall be conclusively deemed to have acted with reasonable or probable cause, if the person presented the check to a depository on which it was drawn and it was refused, and then waited five days after notice, as provided in Va. Code Ann. § 18.2-183, without the instrument being paid.

## Instruction No. 41.000
## Definition of Malicious Prosecution

**Malicious prosecution is the institution of criminal proceedings by one person against another, maliciously and without probable cause, if those proceedings ended in a manner** [favorable; not unfavorable] **to the person prosecuted.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Eubank v. Thomas, 300 Va. 201, 861 S.E.2d 397 (2021)*; *Dill v. Kroger Limited P'ship I, 300 Va. 99, 860 S.E.2d 372 (2021)*; *O'Connor v. Tice, 281 Va. 1, 7, 704 S.E.2d 572, 575 (2011)*; *Baker v. Elmendorf, 271 Va. 474, 476, 628 S.E.2d 358, 359 (2006)*; *Stanley v. Webber, 260 Va. 90, 95, 531 S.E.2d 311, 314 (2000)*; *Ayyildiz v. Kidd, 220 Va. 1080, 1082, 266 S.E.2d 108, 110 (1980)*; *Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 99–100, 244 S.E.2d 767, 773 (1978)*; *Gaut v. Pyles, 212 Va. 39, 42, 181 S.E.2d 645, 647 (1971)*; *Giant of Virginia., Inc. v. Pigg, 207 Va. 679, 683–86, 152 S.E.2d 271, 275–77 (1967)*; *Wiggs v. Farmer, 205 Va. 149, 152, 135 S.E.2d 829, 831–32 (1964)*; *Virginia Ry. & Power Co. v. Klaff, 123 Va. 260, 262, 96 S.E. 244, 246 (1918)*.

### PRACTICE COMMENTARY

The elements of the cause of action for malicious prosecution are discussed in *Eubank v. Thomas, 300 Va. 201, 861 S.E.2d 397 (2021)*; *Dill v. Kroger Limited P'ship I, 300 Va. 99, 860 S.E.2d 372 (2021)*; *Oxenham v. Johnson, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991)*. See also *Lewis v. Kei, 281 Va. 715, 722, 708 S.E.2d 884, 889 (2011)*; *Baker, 271 Va. at 476, 628 S.E.2d at 359*.

An action for malicious prosecution is distinguished from a cause of action for abuse of process. In the latter, the plaintiff must plead and prove (i) the existence of an ulterior purpose and (ii) an act in the use of the process not proper in the regular prosecution of the proceedings. Malicious prosecution lies for maliciously causing process to issue, whereas abuse of process lies for the improper use of process after it has been issued. *Donohoe Constr. Co. v. Mt. Vernon Associates, 235 Va. 531, 540, 369 S.E.2d 857, 862 (1988)*. The Supreme Court of Virginia has recognized that a cause of action for malicious prosecution will also lie for malicious institution of a groundless civil proceeding. *Id.* In such an action, a plaintiff must plead and prove arrest of his person, seizure of his property, or special injury, that is, an injury that would not normally stem from the underlying action. *Ayyildiz, 220 Va. at 1084, 266 S.E.2d at 111*.

☞ ***PRACTICE POINTER:*** Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–362*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

## Instruction No. 41.010
## Instituting Criminal Proceedings

**A person institutes criminal proceedings against another by:**

**(1) bringing the criminal charge(s); or**

**(2) cooperating actively in bringing the criminal charge(s).**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *O'Connor v. Tice, 281 Va. 1, 10, 704 S.E.2d 572, 576 (2011)*; *King v. Martin, 150 Va. 122, 126–29, 142 S.E. 358, 359–360 (1928)*; *Petherbridge v. Bell, 146 Va. 822, 825–26, 132 S.E. 683, 684–685 (1926).*

### PRACTICE COMMENTARY

Being present at the time of the arrest or serving as a witness at trial does not amount to institution of criminal proceedings. *King, 150 Va. at 126–129, 142 S.E. at 359–360.* Causing or carrying through the criminal prosecution by cooperating actively in the prosecution after the charge is brought may amount to malicious prosecution, if done maliciously and without probable cause. See *Clinchfield Coal Corp. v. Redd, 123 Va. 420, 431, 436–37, 96 S.E. 836, 839, 841 (1918).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.020**
**Definition of Malice**

**Malice exists when the controlling motive for instituting criminal proceedings is any reason except a genuine desire to see justice done, to enforce the law, or to punish the guilty.**

**Malice may be inferred from a lack of probable cause.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Dill v. Kroger Limited P'ship I, 300 Va. 99, ___, 860 S.E.2d 372, 378–80 (2021)*; *Reilly v. Shepherd, 273 Va. 728, 733, 643 S.E.2d 216, 219 (2007)*; *Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 589, 594 S.E.2d 915, 917 (2004)*; *Hudson v. Lanier, 255 Va. 330, 333, 497 S.E.2d 471, 473 (1998)*; *Lee v. Southland Corp., 219 Va. 23, 27–28, 244 S.E.2d 756, 759 (1978)*; *Tweedy v. J.C. Penney Co., 216 Va. 596, 599–600, 221 S.E.2d 152, 155 (1976)*; *Gaut v. Pyles, 212 Va. 39, 42, 181 S.E.2d 645, 647 (1971)*; *Giant of Virginia., Inc. v. Pigg, 207 Va. 679, 683–86, 152 S.E.2d 271, 275–77 (1967).*

### Practice Commentary

The malice required in an action for malicious prosecution is implied or imputed malice, as opposed to actual malice. Implied malice may be established by an inference drawn from the facts proved, such as a lack of probable cause. *Tweedy, 216 Va. at 599–600, 221 S.E.2d at 155*; *Lee, 219 Va. at 27, 244 S.E.2d at 759.* Only where punitive damages are sought must actual malice be proved. *Tweedy, 216 Va. at 600, 221 S.E.2d at 155.*

☞ ***Practice Pointer:*** Actual malice is defined in Instruction No. 41.150, Punitive Damages.

*Dill v. Kroger Limited Partnership I, et al, 300 Va. 99, ___, 860 S.E.2d 372, 378 (2021)* contains an overview of the case law defining and refining the element of malice:

> "In the context of malicious prosecution actions, malice is "any controlling motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished." *Hudson v. Lanier, 255 Va. 330, 333, 497 S.E.2d 471 (1998).* "It is not necessary to prove actual spite, hatred, ill will, or grudge against or desire to injury the person charged with the crime." *Freezer v. Miller, 163 Va. 180, 202, 207, 176 S.E. 159 (1934).* We have previously held that an individual acts maliciously if she initiates a criminal prosecution "upon no or such slight grounds of suspicion as to indicate a general disregard of [others]." *Id.* In other words, an individual pursues a criminal prosecution maliciously if her basis for suspecting a defendant is so tenuous that the prosecution can be said to have been "directed by chance" against the defendant. *Id.*
>
> A jury may infer malice from a history of animosity between the parties because the determination of malice is based on the parties' entire course of conduct towards each other, *Pallas v. Zaharopoulos, 219 Va. 751, 755, 757, 205 S.E.2d 357 (1979).* Additionally, a jury may infer malice from a lack of probable cause, thus evidence showing lack of probable cause is always admissible to prove malice. *Reilly, 273 VA. at 733, 643 S.E.2d 216; Freezer, 163 Va. at 207, 176 S.E. 159.* In previous instances when we have inferred malice from the lack of probable cause, we have sometimes referred to such malice as "legal malice." *See*

*Giant of Va., Inc. 207 Va. at 685, 152 S.E.2d 271.*

"The existence of malice 'is always a question for the jury under the circumstances of the case,' " if there is sufficient evidence to make it a jury question. See *id.* (quoting *Clinchfield Coal Corp v. Redd, 124 Va. 420, 443, 444, 96 S.E. 836 (1918)*). Similarly, the inference of malice from a lack of probable cause is usually a question reserved for the jury's determination. *Clinchfield Coal Corp, 123 Va. 443, 96 S.E. 836.* Further, while in an action for malicious prosecution, malice may be inferred by lack of probable cause if the circumstances warrant that inference, the inference may be repelled by other circumstances, despite the lack of probable cause for the prosecution. See *id. at 446, 96 S.E. 836*; *Southern Ry. Co. v. Mosby, 112 Va. 169, 179–80, 70 S.E. 517 (1911).*"

### ***ALERTS:***

- Malice does not have to be inferred from a lack probable cause. *Gaut, 212 Va. at 42, 181 S.E.2d at 647.*

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.035**
**Lack of Malice**

**The defendant in a malicious prosecution action is not liable if he acted without malice in instituting criminal proceedings against the plaintiff. This is true even if the plaintiff was acquitted.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Freezer v. Miller, 163 Va. 180, 200–01, 176 S.E. 159, 166–67 (1934).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- If this instruction is granted, it should be given in conjunction with Instruction No. 41.020, which defines the type of malice required in an action for malicious prosecution.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE Malicious Prosecution §§ 1 through 32

**Instruction No. 41.040**
**Definition of Probable Cause**

**Probable cause to institute criminal proceedings against the plaintiff existed if the facts and circumstances known to the defendant and on which he acted were such that a reasonable and prudent person acting on the same facts and circumstances would have believed the plaintiff guilty of the crime of which he was suspected.**

**In determining whether probable cause existed, you shall consider the facts and circumstances as they appeared to the defendant at the time he instituted the criminal proceedings.**

**A lack of probable cause may not be inferred from malice.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Eubank v. Thomas, 300 Va. 201, ___, 861 S.E.2d 397 (2021)*; *Dill v. Kroger Limited P'ship I, 300 Va. 99, 860 S.E.2d 372 (2021)*; *Lewis v. Kei, 281 Va. 715, 723, 708 S.E.2d 884, 890 (2011)*; *O'Connor v. Tice, 281 Va. 1, 9, 704 S.E.2d 572, 576 (2011)*; *Reilly v. Shepherd, 273 Va. 728, 733, 643 S.E.2d 216, 219 (2007)*; *Baker v. Elmendorf, 271 Va. 474, 480, 628 S.E.2d 358, 361–62 (2006)*; *Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 590, 594 S.E.2d 915, 917 (2004)*; *Stanley v. Webber, 260 Va. 90, 96, 531 S.E.2d 311, 314–15 (2000)*; *Tweedy v. J.C. Penney Co., 216 Va. 596, 599, 221 S.E.2d 152, 155 (1976)*; *Giant of Virginia., Inc. v. Pigg, 207 Va. 679, 684–85, 152 S.E.2d 271, 275–76 (1967)*; *Virginia Elec. & Power Co. v. Wynne, 149 Va. 882, 892, 141 S.E. 829, 833 (1928)*.

### PRACTICE COMMENTARY

Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–62*.

In *O'Connor*, the issuance of the criminal warrant upon findings of probable cause by a prosecuting attorney and a magistrate did not establish, in a malicious prosecution action based on the issuance of that warrant, that probable cause to initiate the criminal proceeding existed as a matter of law. *O'Connor, 281 Va. at 9–11, 704 S.E.2d at 576–77*.

*Eubank v. Thomas, 300 Va. 201, ___, 861 S.E.2d 397, 401 (2021)* noted:

> [P]robable cause is defined as knowledge of such facts and circumstances to raise the belief in a reasonable mind, acting on those facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected." *O'Connor, 281 Va. at 9, 704 S.E.2d 572*; see also *Dill, 300 Va. at ___, 860 S.E.2d at 378–79* (citing *Lewis, 281 Va. at 723, 708 S.E.2d 884*). "The test [of probable cause] is whether the facts and circumstances known, or made known, to the prosecutor are sufficient to justify a prudent and reasonable man in the belief that an accused is guilty of the crime charged," *Giant of Va. Inc. v. Pigg, 207 Va. 679, 684, 152 S.E.2d 271 (1967)*.]

### *ALERTS:*

- Unless reasonable people could not differ on whether probable cause existed, then it is a question for the jury in a malicious prosecution case. *F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599–600 (1973)*. However, if the court finds the evidence insufficient as a matter of law to support a finding that the prosecution against the plaintiff was instituted without probable cause, the court must strike the plaintiff's evidence and enter judgment for the defendant. *Mziguir, 267 Va. at 590, 594 S.E.2d at 918*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.050**
**Probable Cause**

**The defendant in a malicious prosecution action is not liable if he acted with probable cause in instituting criminal proceedings against the plaintiff. This is true even if the plaintiff was acquitted and even if the defendant acted with malice.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Reilly v. Shepherd, 273 Va. 728, 733–34, 643 S.E.2d 216, 219 (2007)*; *Baker v. Elmendorf, 271 Va. 474, 480, 628 S.E.2d 358, 361–62 (2006)*; *Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 589, 594 S.E.2d 915, 917 (2004)*; *Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 99–100, 244 S.E.2d 767, 773 (1978)*; *Wiggs v. Farmer, 205 Va. 149, 152, 135 S.E.2d 829, 831–32 (1964)*; *Freezer v. Miller, 163 Va. 180, 200, 176 S.E. 159, 167 (1934)*.

### PRACTICE COMMENTARY

Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–62.*

### *ALERTS:*

- This instruction emphasizes that probable cause is a crucial element. Whether this element warrants a separate instruction will depend upon the facts of each case.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, *Malicious Prosecution* §§ 1 through 32

## Instruction No. 41.070
## Probable Cause: Willful Concealment or Shoplifting

**A** [merchant; agent or employee of a merchant] **who causes the arrest or detention of any person for** [the willful concealment of goods or merchandise; shoplifting] **is not liable to the plaintiff for malicious prosecution if he proves by the greater weight of the evidence that at the time of such person's arrest or detention, the** [merchant; agent or employee of the merchant] **had probable cause to believe that the person had committed** [willful concealment of goods or merchandise; shoplifting].

[The activation of an electronic article surveillance device as a result of a person exiting the premises or an area within the premises of a merchant where an electronic article surveillance device is located shall constitute probable cause for the detention of such person by such merchant, his agent, or employee, provided such person is detained only in a reasonable manner and only for such time as is necessary for an inquiry into the circumstances surrounding the activation of the device, and provided that clear and visible notice is posted at each exit and location within the premises where such a device is located indicating the presence of an anti-shoplifting or inventory control device.]

[An "electronic article surveillance device" means an electronic device, designed and operated for the purpose of detecting the removal from the premises, or a protected area within such premises, of specially marked or tagged merchandise.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-226.9.

**CASE AUTHORITY:** *Baker v. Elmendorf, 271 Va. 474, 480, 628 S.E.2d 358, 361–62 (2006)*; *Jury v. Giant of Maryland, 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997)* (construing former Va. Code Ann. § 18.2-105); *Brandau v. J.C. Penney Co., 646 F.2d 128, 130, 132 (4th Cir. 1981)*; *Tweedy v. J. C. Penney Co., 216 Va. 596, 599, 221 S.E.2d 152, 155 (1976).*

### PRACTICE COMMENTARY

Va. Code Ann. § 8.01-226.9 exempts from civil liability "for unlawful detention, . . . slander, malicious prosecution, false imprisonment, false arrest, or assault and battery" a "merchant, agent, or employee of the merchant" who causes the arrest of any person for larceny or shoplifting "provided that, in causing the arrest of such person, the merchant, agent or employee of the merchant, had at the time of such arrest or detention probable cause to believe that the person had shoplifted or committed willful concealment of goods or merchandise." In an action for malicious prosecution, the plaintiff ordinarily must prove that the one who instituted the criminal proceeding did not have probable cause. The effect of Va. Code Ann. § 8.01-226.9 requires the defendant merchant to prove probable cause as a defense when the plaintiff's claim is based on prosecution for larceny or shoplifting. *Tweedy, 216 Va. at 600, 221 S.E.2d at 155–56.*

For the probable cause defense, the merchant need only prove that he had probable cause to believe that the plaintiff willfully concealed the merchandise. He is not required to prove that he had probable cause to believe that the plaintiff intended to defraud the defendant. *Brandau, 646 F.2d at 132.*

The immunity granted by Va. Code Ann. § 8.01-226.9 is not absolute. The merchant must have acted reasonably. *Jury, 254 Va. at 238–39, 491 S.E.2d at 720.*

☞ ***PRACTICE POINTER:*** Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–62.*

### *ALERTS:*

None

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.080**
**Probable Cause: Advice of Counsel**

**The defendant is not liable for malicious prosecution if he instituted criminal proceedings against the plaintiff on the good faith advice of a reputable lawyer.**

**The defendant must prove:**

**(1) He sought advice of counsel with an honest purpose of being informed of the law;**

**(2) That he made a full, correct, and honest disclosure of all material facts known to him or that he should reasonably have known; and**

**(3) That he acted in good faith guided by the advice given by counsel.**

**A defendant who relies upon the advice of counsel as a defense has the burden of proving all three of these elements by the greater weight of the evidence.**

**If the defendant proves the necessary elements to establish advice of counsel as a defense, then he had probable cause for instituting the criminal proceedings even if the advice given by the attorney was wrong.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *O'Connor v. Tice, 281 Va. 1, 10, 704 S.E.2d 572, 577 (2011)*; *Andrews v. Ring; 266 Va. 311, 322, 585 S.E.2d 780, 786 (2003)*; *Chipouras v. A.J. & L. Corp., 223 Va. 511, 515–516, 290 S.E.2d 859, 861–62 (1982)*; *Pallas v. Zaharopoulos, 219 Va. 751, 755–56, 250 S.E.2d 357, 359–61 (1979)*; *Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 97, 244 S.E.2d 767, 772 (1978)*; *Evans v. Michaelson, 146 Va. 64, 67–68, 135 S.E. 683, 684 (1926)*.

### PRACTICE COMMENTARY

To establish this defense, the defendant must prove that (1) he sought the advice of a reputable attorney because he wished to be informed of the laws; (2) that he fully, correctly and honestly disclosed all material facts that he knew, or should have known upon a reasonably careful investigation, about the guilt of the party accused; and (3) that in good faith he followed his counsel's advice, causing the plaintiff's arrest. *See Chipouras, 223 Va. at 515, 290 S.E.2d at 861.* The advice-of-counsel defense is a complete defense even though the attorney gives incorrect advice. *Id.*; *Evans, 146 Va. at 68, 135 S.E. at 684.* The advice of counsel cannot be contingent upon future events that do not, in fact, occur. *Chipouras, 223 Va. at 517, 290 S.E.2d at 862.*

The advice of a judge is also a defense if the rest of the requirements are met. *Evans, 146 Va. at 68, 135 S.E. at 684.*

☞ ***PRACTICE POINTER:*** For a case involving actions for malicious prosecution based on a civil proceeding, see *Ayyildiz v. Kidd, 220 Va. 1080, 1083–84, 266 S.E.2d 108, 111–112 (1980).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.110**
**Elements Stipulated or Proved as a Matter of Law**

**The defendant instituted a criminal proceeding against the plaintiff that ended in a manner** [favorable; not unfavorable] **to the plaintiff. You must still determine from the evidence and the instructions whether the criminal proceeding was instituted without probable cause and with malice.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Wiggs v. Farmer, 205 Va. 149, 152, 135 S.E.2d 829, 831 (1964).*

### PRACTICE COMMENTARY

This instruction is intended for those cases where it is undisputed that the defendant instituted a criminal proceeding against the plaintiff and that the disposition of the criminal proceeding was not unfavorable to the plaintiff.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.130**
**Finding Instruction: General**

**You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

(1) **the defendant** [instituted; cooperated with the institution of] **a criminal proceeding against the plaintiff; and**

(2) **that criminal proceeding ended in a manner** [favorable; not unfavorable] **to the plaintiff; and**

(3) **the criminal proceeding was instituted by the defendant without probable cause; and**

(4) **the defendant acted with malice.**

**You shall find your verdict for the defendant if the plaintiff failed to prove one or more of the elements above.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Reilly v. Shepherd, 273 Va. 728, 732, 643 S.E.2d 216, 218 (2007)*; *Baker v. Elmendorf, 271 Va. 474, 476, 628 S.E.2d 358, 359 (2006)*; *Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 589, 594 S.E.2d 915, 917 (2004)*; *Andrews v. Ring, 266 Va. 311, 322, 585 S.E.2d 780, 786 (2003)*; *Stanley v. Webber, 260 Va. 90, 95–96, 531 S.E.2d 311, 314 (2000)*; *Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 96, 244 S.E.2d 767, 771 (1978)*.

### PRACTICE COMMENTARY

The elements of the cause of action for malicious prosecution are discussed in *Oxenham v. Johnson, 241 Va. 281, 287, 402 S.E.2d 1, 4 (1991)*; *see also Lewis v. Kei, 281 Va. 715, 722, 708 S.E.2d 884, 889 (2011)*; *Baker, 271 Va. at 476, 628 S.E.2d at 359*.

When elements (1) and (2) are stipulated or proved as a matter of law, see Instruction No. 41.110, Elements Stipulated or Proved as a Matter of Law, this instruction should be modified to eliminate those elements, and the instruction renumbered accordingly.

### *ALERTS:*

- A merchant who institutes a criminal proceeding for the willful concealment of goods or merchandise is not liable to the plaintiff if the merchant proves that he had probable cause to bring the criminal charge. See Instructions 41.070, Probable Cause: Willful Concealment or Shoplifting, 41.135, Issues and Allocation of Burdens of Proof—Where Defendant Is a Merchant, and 41.136, Finding Instruction: Where Defendant Is a Merchant.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.135**

**Issues and Allocation of Burdens of Proof—Where Defendant Is a Merchant**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

**(1) Did the defendant institute a criminal proceeding against the plaintiff?**

**(2) Did the criminal proceeding end in a manner** [favorable; not unfavorable] **to the plaintiff?**

**(3) Did the defendant act with malice?**

**On these issues, the plaintiff has the burden of proof.**

**(4) Was there probable cause to institute the criminal proceeding?**

**On this issue, the defendant has the burden of proof.**

**(5) If the plaintiff is entitled to recover, what is the amount of his damages?**

**On this issue, the plaintiff has the burden of proof.**

**Your decision on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-226.9.

**CASE AUTHORITY:** *Baker v. Elmendorf, 271 Va. 474, 480, 628 S.E.2d 358, 361–362 (2006)*; *Jury v. Giant of Maryland, 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997)* (construing former Va. Code Ann. § 18.2-105); *Tweedy v. J.C. Penney Co., 216 Va. 596, 599–600, 221 S.E.2d 152, 155 (1976).*

### PRACTICE COMMENTARY

*See generally* the Practice Commentary Instruction No. 41.070.

☞ ***PRACTICE POINTER:*** Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–62.*

### ***ALERTS:***

- This instruction should only be used when the defendant is a merchant, or its agent, or employee.

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

## Instruction No. 41.136
## Finding Instruction: Where Defendant Is a Merchant

**You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

**(1) the defendant instituted a criminal proceeding against the plaintiff; and**

**(2) that criminal proceeding ended in a manner** [favorable; not unfavorable] **to the plaintiff; and**

**(3) the defendant acted with malice.**

**You shall find your verdict for the defendant if:**

**(1) the plaintiff failed to prove one or more of the elements above; or**

**(2) you find by the greater weight of the evidence that the defendant had probable cause to institute the criminal proceeding.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.01-226.9.

**CASE AUTHORITY:** *Baker v. Elmendorf, 271 Va. 474, 480, 628 S.E.2d 358, 361–62 (2006)*; *Jury v. Giant of Maryland, 254 Va. 235, 238–39, 491 S.E.2d 718, 720 (1997)* (construing former Va. Code Ann. § 18.2-105); *Tweedy v. J.C. Penney Co., 216 Va. 596, 599–600, 221 S.E.2d 152, 155 (1976).*

### PRACTICE COMMENTARY

*See generally* the Practice Commentary to Instruction No. 41.070, Probable Cause: Willful Concealment or Shoplifting.

☞ ***PRACTICE POINTER:*** Plaintiff's conviction in the district court which was appealed may not be admitted into evidence in a malicious prosecution case, even to establish probable cause. *Baker, 271 Va. at 480, 628 S.E.2d at 361–62.*

### *ALERTS:*

- This instruction should only be used when the defendant is a merchant, or its agent, or employee.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4., 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.140**
**Compensatory Damages**

**If you find your verdict for the plaintiff, then in determining the damages to which the plaintiff is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the criminal proceeding instituted by the defendant:**

**(1) property loss;**

**(2) necessary expenses;**

**(3) insult;**

**(4) pain;**

**(5) mental suffering, anxiety or distress;**

**(6) harm to the plaintiff's reputation.**

**Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for damages sustained as a result of the criminal proceeding instituted by the defendant.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Giant of Virginia., Inc. v. Pigg, 207 Va. 679, 685, 152 S.E.2d 271, 276 (1967)*; *Spitzer v. Clatterbuck, 202 Va. 1001, 1007, 121 S.E.2d 466, 470 (1961).*

### PRACTICE COMMENTARY

In awarding compensatory damages, the jury may consider any loss occurring to the plaintiff's property, and any money it was necessary for the plaintiff to pay such as, for example, the cost of defending the criminal charge. The jury may also consider the insult, pain, or mental suffering and the damage to the plaintiff's reputation that the prosecution caused. *Pigg, 207 Va. at 685, 152 S.E.2d at 276.*

Distress and harm to a person's reputation naturally result from a malicious prosecution. Such damages are presumed in law, and no special proof of harm is required. *Spitzer, 202 Va. at 1007, 121 S.E.2d at 470.*

For compensatory damages to be awarded, malice may be inferred from the lack of probable cause. For punitive damages to be awarded, the plaintiff must prove actual malice. *Pigg, 207 Va. at 686, 152 S.E.2d at 277.*

### *ALERTS:*

- This instruction follows the format of the general instruction on damages, Instruction No. 9.000. When using this instruction, omit any of the subparagraphs (1)–(6) which are inapplicable to the case and renumber accordingly.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4, 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

**Instruction No. 41.150**
**Punitive Damages**

**If you find that the plaintiff is entitled to be compensated for his damages, and if you further believe by the greater weight of the evidence that the defendant acted with actual malice in instituting the criminal proceeding against the plaintiff, then you may award punitive damages to the plaintiff to punish the defendant for his actions and to serve as an example to prevent others from acting in a similar way.**

**Actual malice is a sinister or corrupt motive such as hatred, personal spite, ill will, a desire to injure the plaintiff, or a conscious disregard of the rights of others. Actual malice may not be inferred from a lack of probable cause.**

**If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages, if any, and the amount you allow as punitive damages.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lee v. Southland Corp., 219 Va. 23, 27–28, 244 S.E.2d 756, 759 (1978)*; *F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973)*; *Gaut v. Pyles, 212 Va. 39, 42–43, 181 S.E.2d 645, 647–648 (1971)*; *Giant of Va., Inc. v. Pigg, 207 Va. 679, 686, 152 S.E.2d 271, 277 (1967)*.

### PRACTICE COMMENTARY

For the general instruction and a more detailed discussion of punitive damages, see Instruction No. 9.080, General Punitive Damages. The definition of "actual malice" in this instruction is taken from Instruction No. 9.090, Punitive Damages: Definition of Common Law Actual Malice.

Va. Code Ann. § 8.01-38.1 sets out the Virginia "cap" on the recovery of punitive damages.

Punitive damages may be awarded against a corporate employer only if either (1) that employer participated in the wrongful acts giving rise to the punitive damages, or (2) that employer authorized or ratified the wrongful acts giving rise to the punitive damages. To subject a corporate employer to punitive-damages liability on the basis that the corporate employer itself committed the wrongful acts, the employee who committed the wrongful acts must be in a sufficiently high position in the employer's corporate structure. How high a position in the corporate ranks is sufficient to make the actions of the employee the actions of the employer is a fact sensitive question, dependent on the power, role, and independence of the employee relative to the nature and structure of the corporate employer. *Egan v. Butler, 290 Va. 62, 75–76, 772 S.E.2d 765, 773 (2015)*.

### *ALERTS:*

- For a discussion regarding due process requirements for jury instructions on punitive damages, see the discussion in the Scope Note to Chapter 9, Damages.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 6.1, 13.5, 18.2

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE §§ 23.05, 25.03

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15, 5-2, 5-7

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 3.2, 3.7, 4.4, 4.9, 13.4

Kent Sinclair, VIRGINIA REMEDIES, Chapter 23

MICHIE'S JURISPRUDENCE, Malicious Prosecution §§ 1 through 32

*See also* the Research References provided for Instruction Nos. 9.080 (General Punitive Damages) and 9.090 (Punitive Damages: Definition of Common Law Actual Malice).

# Chapter 42

# ATTORNEY AND CLIENT



## Scope Note

**Instruction No. 42.000** **Creation of Attorney and Client Relationship**
**Instruction No. 42.010** **Attorney's Standard of Care**
**Instruction No. 42.020** **Scope of Attorney's Authority**
**Instruction No. 42.030** **Attorney and Client Relationship and Third Parties: Apparent Authority**
**Instruction No. 42.040** **Ratification by Client**
**Instruction No. 42.050** **Dealings Between Attorney and Client**
**Instruction No. 42.060** **Wrongfully Discharged Attorney Entitled to Quantum Meruit**

# SCOPE NOTE

These seven instructions cover the parameters of the agreement giving rise to the attorney and client relationship and the dealings between the attorney and client. These parameters include the creation of the relationship, the attorney's duty of care toward the client, the scope of the attorney's authority, and the binding effect, if any, of unauthorized acts by the attorney.

Instruction No. 42.000, Creation of Attorney and Client Relationship, delineates the point at which the attorney and client relationship arises. The relationship requires an agreement between the parties that the attorney will act in a representative capacity for the client. The agreement need only be a contract for employment, either express or implied, and does not have to include any formality. See Chapter 45, Contracts.

The standard of care imposed on an attorney is set out in Instruction No. 42.010, Attorney's Standard of Care. Failure to exercise a reasonable degree of care in the performance of client-related duties renders the attorney liable for negligence.

Instruction No. 42.020, Scope of Attorney's Authority, delineates the extent of the attorney's authority, whether express or implied, to undertake actions pursuant to his obligations to the client. Note that the client's express authority may be required in some situations, and that the client's actions toward third parties may create a reasonable inference that apparent authority exists.

Such apparent authority, as set forth in Instruction No. 42.030, Attorney and Client Relationship and Third Parties, operates when the client acts in such a manner as to lead a third party reasonably to believe that an attorney and client relationship exists.

If the client ratifies the attorney's previously unauthorized acts, the attorney's scope of authority can be further broadened as set forth in Instruction No. 42.040, Ratification by Client. Ratification of an unauthorized act, evidenced by the client's acquiescence, will bind the client.

Instruction No. 42.050, Dealings Between Attorney and Client, qualifies the scope of the attorney's authority: any self-serving action by the attorney, once an attorney and client relationship exists, is presumed to be invalid. Clear and convincing evidence is required to establish the transaction's validity.

Finally, Instruction No. 42.060, Wrongfully Discharged Attorney Entitled to Quantum Meruit, discusses the attorney's remedy if he is discharged without just cause. In such a situation, the attorney is entitled to recover the reasonable value of the services he rendered before he was discharged.

**Instruction No. 42.000**
**Creation of Attorney and Client Relationship**

**A relationship of attorney and client arises when there is an agreement between them that the attorney will act as a lawyer for the client.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *O'Connell v. Bean, 263 Va. 176, 180, 556 S.E.2d 741, 743 (2002)*; *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 432, 457 S.E.2d 28, 32 (1995)*; *Carstensen v. Chrisland Corp., 247 Va. 433, 447, 442 S.E.2d 660, 668–669 (1994)*; *Glenn v. Haynes, 192 Va. 574, 579–580, 66 S.E.2d 509, 512 (1951)*; *Nicholson v. Shockey, 192 Va. 270, 276–277, 64 S.E.2d 813, 817 (1951)*; *Ewing v. Haas, 132 Va. 215, 222, 111 S.E. 255, 258 (1922).*

### PRACTICE COMMENTARY

The attorney and client relationship may involve questions of contract law. See Chapter 45, Contracts. Questions of agency may also be involved. See Chapter 8, Agency, Employment and Similar Relationships. Finally, tort concepts may be involved. See Instruction No. 42.010, Attorney's Standard of Care; Chapter 35, Professional Liability.

The attorney-client relationship arises out of a contract, express or implied. Implicit in a professional employment contract is the duty to "exercise the care of those ordinarily skilled in the business," and to "exercise a reasonable degree of care, skill, and dispatch in carrying out the business for which [the professional] is employed." *O'Connell, 263 Va. at 180–81, 556 S.E.2d at 743.*

The contract statute of limitations applies to legal malpractice. *Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976).* In *O'Connell*, the Court held that while allegations of breach of fiduciary duty and constructive fraud sound in tort, they are actions in contract for purposes of the statute of limitations and determining whether punitive damages can be awarded. *O'Connell, 263 Va. at 180–181, 556 S.E.2d at 743.* For this reason, punitive damages may not be awarded for any breach of such duty in the absence of an independent, willful tort. *Id. at 181, 556 S.E.2d at 743*; *Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983).*

☞ ***PRACTICE POINTER:*** In a tort action, an attorney employed by the insurer to represent the insured owes the insured the same duty as if privately retained by the insured. *State Farm Fire & Cas. Co. v. Mabry, 255 Va. 286, 291, 497 S.E.2d 844, 847 (1998).*

### *ALERTS:*

- "When an attorney acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties, and, in this limited sense, all the parties are his clients." The "lawyer assumes the duties of a fiduciary and must properly handle and dispose of any funds not his own which he may receive in connection with the settlement." *Pickus v. Virginia State Bar, 232 Va. 5, 15, 348 S.E.2d 202, 208 (1986).*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

**Instruction No. 42.010**
**Attorney's Standard of Care**

**An attorney has a duty to use a reasonable degree of care, skill, and diligence in handling a matter entrusted to him by a client.**

**If an attorney fails to perform this duty, then he is negligent.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 54.1-3906.

**Case Authority:** *Desetti v. Chester, 290 Va. 50, 54–57, 772 S.E.2d 907, 909–10 (2015)*; *Smith v. McLaughlin, 289 Va. 241, 266, 769 S.E.2d 7, 20 (2015)*; *O'Connell v. Bean, 263 Va. 176, 180–181, 556 S.E.2d 741, 743 (2002)*; *Campbell v. Bettius, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992)*; *Ortiz v. Barrett, 222 Va. 118, 126–128, 278 S.E.2d 833, 836–837 (1981)*; *Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976)*; *Fowler v. American Fed'n of Tobacco Growers, Inc., 195 Va. 770, 782–783, 80 S.E.2d 554, 561 (1954)*; *Glenn v. Haynes, 192 Va. 574, 580–581, 66 S.E.2d 509, 512–513 (1951)*.

## Practice Commentary

This instruction assumes that neither side disputes that an attorney-client relationship existed. If there is a conflict on that issue, see Instruction No. 42.000, Creation of Attorney and Client Relationship.

### *Nature of the Action*

Va. Code Ann. § 54.1-3906 provides: "Every attorney shall be liable to his client for any damage sustained by the client through the neglect of his duty as such attorney."

An action for negligence of an attorney in the performance of professional services, while sounding in tort is an action for breach of contract. *Shipman v. Kruck, 267 Va. 495, 501, 593 S.E.2d 319, 322 (2004)*; *O'Connell, 263 Va. at 181, 556 S.E.2d at 743*; *Oleyar, 217 Va. at 90, 225 S.E.2d at 399–400*.

"A cause of action for legal malpractice [arising out of a civil matter] requires the existence of an attorney-client relationship which gave rise to a duty, breach of that duty by the defendant attorney, and that the [pecuniary] damages claimed by the plaintiff client must have been proximately caused by the defendant attorney's breach." *Desetti, 290 Va. at 56, 772 S.E.2d at 909–10*.

### *Matters of Proof*

"A legal malpractice plaintiff who alleges that malpractice occurred during the course of a criminal matter has additional burdens of pleading" to "ensure that courts do not assist the participant in an illegal act who seeks to profit from the act's commission." *Desetti, 290 Va. at 56, 772 S.E.2d at 910*. Therefore, "a legal malpractice plaintiff who alleges that malpractice occurred during the course of a criminal matter must plead facts establishing this element of the cause of action: that the damages to be recovered were proximately caused by the attorney's negligence but were not proximately caused by the legal malpractice plaintiff's own criminal actions." *Id.* (demurrer sustained in legal malpractice action where plaintiff failed to plead that her attorney's malpractice, as opposed to her own commission of a crime, proximately caused her damages); *Smith, 289 Va. at 268–69, 769 S.E.2d at 21* (malpractice plaintiff's criminal escape conviction was an intervening, superseding cause of the injury to lost income for the time of incarceration). Additionally, a legal malpractice plaintiff must prove post-

conviction relief and innocence entitling him to relief. *Id. at 251, 769 S.E.2d at 12.*

Contributory negligence is available as a defense in legal malpractice actions. *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 432, 457 S.E.2d 28, 32 (1995).*

The standard of review in malpractice actions involving the attorney's handling of an appeal is whether the client can prove that as a matter of law the judgment against him would have been reversed. *Wintergreen Partners, Inc. v. McGuire-Woods, LLP, 280 Va. 374, 378, 698 S.E.2d 913, 915 (2010).* "[I]f an attorney exercises a 'reasonable degree of care, skill, and dispatch' while acting in an unsettled area of the law, which is to be evaluated in the context of 'the state of the law at the time' of the alleged negligence, then the attorney does not breach the duty owed to the client." *Smith, 289 Va. at 255, 769 S.E.2d at 14* (as a matter of law, defendant attorney did not breach its duty by failing to correctly anticipate a judicial ruling on an unsettled legal issue).



***The Statute of Limitations and Accrual***

The contract statute of limitations applies instead of the tort statute even if the basis of the action is negligent performance. Va. Code Ann. § 8.01-246; *Shipman, 267 Va. at 501, 593 S.E.2d at 322*; *MacLellan v. Throckmorton, 235 Va. 341, 343–344, 367 S.E.2d 720, 721–722 (1988)*; *Keller v. Denny, 232 Va. 512, 517–518, 352 S.E.2d 327, 330–331 (1987)*; *Winslow, Inc. v. Scaife, 219 Va. 997, 254 S.E.2d 58 (1979)*; *Goodstein v. Weinberg, 219 Va. 105, 245 S.E.2d 140 (1978)*; *Oleyar, 217 Va. at 90, 225 S.E.2d at 400*; *McCormick v. Romans, 214 Va. 144, 198 S.E.2d 651 (1973).*

Generally, a cause of action for legal malpractice arises when the malpractice occurs. *Moonlight Enters, LLC v. Mroz, 293 Va. 224, 230, 797 S.E.2d 536, 538 (2017).*

When legal malpractice is claimed with respect to a particular undertaking or transaction that requires a continuous or recurring course of professional services, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client. *Moonlight Enters, LLC, 293 Va. at 230, 797 S.E.2d at 538–39*; *MacLellan, 235 Va. at 345, 367 S.E.2d at 722*; *Keller, 232 Va. at 517–518, 352 S.E.2d at 330*; *Shipman, 267 Va. at 504–506, 593 S.E.2d at 322.* "The continuous-representation rule applies 'only when a continuous or recurring course of professional services relating to a particular undertaking is shown to have taken place over a period of time.' " *Moonlight Enters., LLC, 293 Va. at 230, 797 S.E.2d at 539 (quoting Keller, 232 Va. at 518, 352 S.E.2d at 331).* " 'The proper inquiry is not whether a general attorney-client relationship has ended, but instead, when the attorney's work on the particular undertaking at issue has ceased.' " *Id. (quoting Shipman, 267 Va. at 505, 593 S.E.2d at 324).*

When the alleged malpractice consists of a single, isolated act, the statute of

limitations begins to run when the act is performed, regardless of the time of discovery. *Van Dam v. Gay, 280 Va. 457, 461, 699 S.E.2d 480, 482 (2010)*; Va. Code Ann. § 8.01-230.

In legal malpractice damages actions concerning estate planning, the action accrues "upon completion of the representation during which the malpractice occurred." Va. Code Ann. § 64.2-520.1(A). The statute of limitations for a legal malpractice action for damages relating to estate planning is five years if the legal representation was based on a written contract, and is three years if the legal representation is based on an unwritten contract. Va. Code Ann. § 64.2-520.1(C).

The General Assembly revised the Code in response to *Thorsen v. Richmond SPCA, 292 Va. 257, 786 S.E.2d 453 (2016),* which concerned a legal malpractice claim by a third-party beneficiary to the attorney-client relationship for estate planning. Under Va. Code Ann. § 64.2-520.1(B), a person who is not a party to the representation shall have standing to maintain such an action only if there is a "written agreement between the individual and the defendant that expressly grants standing to a person who is not a party to the representation by specific reference to this subsection."

***Damages***

A legal malpractice plaintiff may recover only pecuniary damages proximately caused by an attorney's breaches; tort damages, such as damages for mental anguish, emotional distress, and humiliation are not recoverable in a legal malpractice action. *Smith, 289 Va. at 265–66, 769 S.E.2d at 20.*

" 'There is no single measure of damages in a legal malpractice case, and, generally, the appropriate measure must be determined by the facts and circumstances of each case.' " *Smith, 289 Va. at 261, 769 S.E.2d at 17* (*quoting Lyle, 249 Va. at 435, 457 S.E.2d at 33*).

The amount of damages may be based upon the value of what is lost by the client, e.g., the amount of spousal support that would have been ordered but was not. *Duvall, Blackburn, Hale & Downey v. Siddiqui, 243 Va. 494, 416 S.E.2d 448 (1992)* (an attorney is liable only for actual injury to his client); *Campbell v. Bettius, 244 Va. 347, 352, 421 S.E.2d 433, 436 (1992)* (holding that the client must prove what he would have gotten otherwise).

Collectibility is relevant in legal malpractice claims, and "is implicated when the injury claimed by the legal malpractice plaintiff is the loss of an otherwise viable claim." *Smith, 289 Va. at 262, 769 S.E.2d at 17.* The burden of pleading and disproving collectibility rests on the negligent attorney as an affirmative defense. *Id. at 262, 769 S.E.2d at 18.*

In *Shipman, 267 Va. at 508–509, 593 S.E.2d at 326–327*, the Supreme Court expressly overruled its earlier ruling in *Allied Prods. v. Duesterdick, 217 Va. 763, 232 S.E.2d 774 (1977).* The "payment rule" did not govern the running of the statutory period of limitations in the legal malpractice case because the cause of action arose at the time of the attorney's breach, subject to the continuing

representation rule. *Shipman, 267 Va. at 508–509, 593 S.E.2d at 326–327.*

☞ ***PRACTICE POINTER:*** While an action for the negligence of an attorney in the performance of professional duties is considered an action for breach of contract, the specific contract with the attorney may independently impose additional contractual obligations. See generally, Chapter 45, Contracts.

### ***ALERTS:***

- An executor of an estate cannot maintain an action for legal malpractice in the preparation of the decedent's testamentary documents. *Rutter v. Jones, Blechman, Woltz & Kelly, 264 Va. 310, 313–14, 568 S.E.2d 693, 695 (2002).* Nor does a sole testamentary beneficiary have standing to bring a legal malpractice action in her own name against the attorney for the estate for negligent services rendered to the estate. *Johnson v. Hart, 279 Va. 617, 625, 692 S.E.2d 239, 243 (2010).*



### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

[illegible]

[illegible] performance of professional duties is considered an action for breach of contract, the specific contract with the attorney may independently impose additional contractual obligations. See generally Chapter 15 (Contracts).

## [illegible]

- An executor of an estate cannot maintain an action for legal malpractice in [illegible] [illegible], 254 Va. 310, 31[illegible], [illegible] S.E.2d 691, 693 (1997). Nor does a sole testamentary beneficiary have standing to bring a legal malpractice action in her own name against the attorney for the estate for negligent services rendered to the estate. Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 243 (2010).

## [illegible]

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07.

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.3, 4.4, 4.11, 15.5.

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9.

[illegible], Attorney and Client §§ 1 through 5 [illegible].

## Instruction No. 42.020
## Scope of Attorney's Authority

**An attorney has the express authority to do everything which the client expressly authorized him to do and the implied authority to do everything necessary or incidental to the purpose for which he was retained.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Virginia Concrete Co. v. Board of Sup'rs Fairfax Cnty., 197 Va. 821, 827–829, 91 S.E.2d 415, 420–421 (1956)*; *Harris v. Diamond Const. Co., 184 Va. 711, 722–724, 36 S.E.2d 573, 578–579 (1946)*; *Dawson v. Hotchkiss, 160 Va. 577, 580–582, 169 S.E. 564, 565–566 (1933)*; *Rhoades v. Banking, Trust & Mtg. Co., 125 Va. 320, 334–335, 99 S.E. 673, 676 (1919).*

### PRACTICE COMMENTARY

The relationship of attorney and client is governed by agency law. Generally, an attorney has the authority to do anything that his client has expressly or impliedly given him authority to do. In each of these instances, whether an attorney had authority to do something may be affected by what the client said or did with respect to the attorney. An agent can also exercise apparent authority, however. Apparent authority may be affected by what the principal said or did to third parties to make reasonable their belief that the attorney had the authority that he is now claimed to have had. Even if the client did not expressly or impliedly give his attorney authority or did nothing in the presence of third parties to create apparent authority so that the attorney acted without any authority whatsoever, the client can supply the authority by ratifying the attorney's acts. See Instruction Nos. 42.040, Ratification by Client; 42.030, Attorney and Client Relationship and Third Parties: Apparent Authority; see also Chapter 44, Compromise and Settlement.

### *ALERTS:*

- In determining whether an attorney may settle a case, compare *Dawson, 160 Va. at 580–582, 169 S.E. at 565–566*, and *Virginia Concrete, 197 Va. at 827–829, 91 S.E.2d at 420–421* with *Singer Sewing Mach. Co. v. Ferrell, 144 Va. 395, 402, 132 S.E. 312, 314 (1926).*

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

## Instruction No. 42.030

## Attorney and Client Relationship and Third Parties: Apparent Authority

**So far as third parties are concerned, an attorney and client relationship exists when the client has dealt with the third party or acquiesced in the attorney dealing with the third party in such a way as to cause a person reasonably to believe that an attorney and client relationship exists.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Walson v. Walson, 37 Va. App. 208, 214–217, 556 S.E.2d 53, 55–56 (2001).* See *Singer Sewing Mach. Co. v. Ferrell, 144 Va. 395, 403–405, 132 S.E. 312, 315 (1926).*

### PRACTICE COMMENTARY

This instruction presents the issue of the apparent authority of an attorney. See Instruction No. 42.020, Scope of Attorney's Authority, for a discussion of express and implied authority.

An agent can have three types of authority: express, implied and apparent. Express authority covers any act which the principal explicitly allows or directs the agent to do; implied authority covers those acts inherently incidental to the express authority given the agent by the principal; apparent authority is the power that an agent has because the principal either has held him out to others as having this power or has acquiesced in the agent's manifestations of power. See Instruction No. 47.040, Agent's Apparent Authority.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

## Instruction No. 42.040
## Ratification by Client

**A client ratifies** [an unauthorized act of his attorney; an act that was beyond the attorney's express or implied authority at the time he did it] **if the client, after receiving full knowledge of all material facts about his attorney's act, either:**

**(1) speaks or acts in such a way as to accept the attorney's act as binding him; or**

**(2) fails promptly to disavow the attorney's act within a reasonable time after he knows about it; or**

**(3) accepts the benefits of the attorney's act.**

**If a client ratifies an unauthorized act of his attorney, then that act is binding upon him.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Kilby v. Pickurel, 240 Va. 271, 275, 396 S.E.2d 666, 668–669 (1990)*; *Musselman v. Willoughby Corp., 230 Va. 337, 344–345, 337 S.E.2d 724, 728–729 (1985)*; *Dawson v. Hotchkiss, 160 Va. 577, 581–582, 169 S.E. 564, 565–566 (1933)*; *Herrell v. Board of Sup'rs Prince William Cnty., 113 Va. 594, 596, 75 S.E. 87, 88 (1912).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

• This instruction is more appropriate in actions involving the client and third parties than in actions involving the attorney and the client. As between the attorney and the client, if the purported ratification benefits the attorney, it may be a breach of his fiduciary relationship with his client. See Instruction No. 42.050, Dealings Between Attorney and Client.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

## Instruction No. 42.050
## Dealings Between Attorney and Client

**Once an attorney and client relationship exists, any** [transaction; dealing] **between them that benefits the attorney is presumed to be invalid.**

**To establish that the** [transaction; dealing] **was valid, the burden is on the attorney to prove by clear and convincing evidence that:**

**(1) he did not use any undue influence on his client; and**

**(2) he dealt fairly with his client in the** [transaction; dealing]**; and**

**(3) the client entered into the** [transaction; dealing] **with a sufficient understanding of the nature and extent of his rights to allow him to understand fully the scope and effect of the** [transaction; dealing].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Nicholson v. Shockey, 192 Va. 270, 277–278, 64 S.E.2d 813, 817–818 (1951)*; *Byars v. Stone, 186 Va. 518, 529–531, 42 S.E.2d 847, 852–853 (1947)*; *Bruce v. Bibb, 129 Va. 45, 48–51, 105 S.E. 570, 571–572 (1921)*; *Thomas v. Turner's Adm'r, 87 Va. 1, 12–23, 12 S.E. 149, 153–157 (1890).*

### PRACTICE COMMENTARY

This instruction and the cases cited relate to transactions or agreements between attorney and client other than fee arrangements. Fee arrangements between attorney and client are subject to the Virginia Rules of Professional Conduct and statutes that apply to particular types of proceedings. For example, Va. Code Ann. § 65.2-714 provides for the approval and award of counsel fees by the Workers' Compensation Commission ("Commission"). In *Hudock v. Virginia State Bar, 233 Va. 390, 355 S.E.2d 601 (1987)*, the attorney entered into a one-third contingency fee arrangement with his client. This was not disclosed to the Commission, which awarded the attorney less than his contingency. *Id. at 393–394, 355 S.E.2d at 603.* The Supreme Court held that any fee collected over and above the Commission's award was illegal. *Id.*

"[A]ll dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence." *Thomas, 87 Va. at 12, 12 S.E. at 153.*

☞ ***PRACTICE POINTER:*** Where attorney fees are sought from a third party in the course of a lawsuit, the burden is on the party seeking attorney fees to show that they are reasonable and that they were necessary. *West Square L.L.C. v. Communication Techs., Inc., 274 Va. 425, 433–434, 649 S.E.2d 698, 702 (2007)*; *Chawla v. Burgerbusters, Inc., 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).* For a general discussion of the factors a court considers when weighing the reasonableness of an award of attorney's fees, see *Denton v. Browntown Valley Assocs., 294 Va. 76, 88, 803 S.E.2d 490, 497 (2017)*, and *Lambert v. Sea Oats Condo. Ass'n, Inc., 293 Va. 245, 254, 798 S.E.2d 177, 183 (2017).*

### ***ALERTS:***

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

## Instruction No. 42.060
## Wrongfully Discharged Attorney Entitled to Quantum Meruit

**When an attorney employed under a contingent fee contract is discharged without just cause and the client employs another attorney who obtains a recovery, the discharged attorney is entitled to a fee based upon the reasonable value of the services he rendered prior to discharge.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Zelnick v. Adams, 263 Va. 601, 610, 561 S.E.2d 711, 716–17 (2002)*; *Hughes v. Cole, 251 Va. 3, 23, 465 S.E.2d 820, 833 (1996)*; *Fary v. Aquino, 218 Va. 889, 891, 241 S.E.2d 799, 800 (1978)*; *Heinzman v. Fine, Fine, Legum & Fine, 217 Va. 958, 964, 234 S.E.2d 282, 286 (1977).*

### PRACTICE COMMENTARY

In the absence of a fee arrangement, see Instruction No. 45.570, Quantum Meruit; *Wood v. Carwile, 231 Va. 320, 324, 343 S.E.2d 346, 348 (1986).* An attorney may obtain a lien on a client's cause of action to secure fees and services rendered. Va. Code Ann. § 54.1-3932.

For the factors to be considered in determining the value of counsel's services, see *Hughes, 251 Va. at 25, 465 S.E.2d at 834.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 5.07

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE §§ 2.2, 2.3, 3.2, 3.7, 4.4, 4.9, 4.11, 18.3

Kent Sinclair, VIRGINIA REMEDIES §§ 22-1 through 22-9

MICHIE'S JURISPRUDENCE, Attorney and Client §§ 1 through 3, 8 through 32

# Chapter 43

# BROKERS

## Scope Note


**Instruction No. 43.000** **General Agency**

**Instruction No. 43.010** **Implied Brokerage Contract**

**Instruction No. 43.020** **Procuring Cause: General**

**Instruction No. 43.030** **Procuring Cause: Known Rival Brokers**

**Instruction No. 43.040** **Procuring Cause: Unknown Rival Brokers**

**Instruction No. 43.050** **Definition of Ready, Willing and Able**

**Instruction No. 43.060** **Broker's Good Faith: Generally**

**Instruction No. 43.070** **Broker's Good Faith: Adverse Interests**

**Instruction No. 43.080** **Seller Not Sole Owner**

# SCOPE NOTE

These instructions cover the basic considerations involved in determining whether a broker has earned his commission. They are drafted for a case involving a real estate broker as these cases are most common. These instructions can be adapted to cover other broker situations.

The first inquiry should be whether there is an express contract. If there is an express contract, then the broker is a special agent with the terms of the contract normally controlling, and the instructions from Chapter 45, Contracts, will be more important than those from this chapter.

The instructions in this chapter generally assume that the broker is a general agent acting under an implied contract and that the only issue is whether the broker has earned his commission. Instruction No. 43.000, General Agency, states what a general agent must do to earn his commission. When the parties dispute the existence of the general agency, see Instruction No. 43.010, Implied Brokerage Contracts.

Whether a general agent is entitled to a commission may depend on whether the agent produced a ready, willing and able buyer. The term "ready, willing, and able buyer" is defined in Instruction No. 43.050.

Sometimes the issue in a case concerns who was the procuring cause of the sale where multiple brokers are involved. Three instructions deal with whether the broker was the procuring cause of the sale. Instruction No. 43.020 gives the general criteria a broker must meet to be the procuring cause of the sale. Instruction Nos. 43.030 and 43.040 concern the specific situation where two or more rival brokers are involved. If the rival brokers are aware of each other's employment, Instruction No. 43.030 applies; if they are unaware of each other's employment, Instruction No. 43.040 applies.

A broker must do more than be the procuring cause of a sale with a ready, willing and able buyer. The broker is in a fiduciary relationship with his principal, and he must use good faith in all his dealings with his principal. *Van Deusen v. Snead, 247 Va. 324, 331, 441 S.E.2d 207, 211 (1994).* As a fiduciary, the broker must act with due regard for the interests of the principal. *H-B Ltd. P'ship v. Wimmer, 220 Va. 176, 179, 257 S.E.2d 770, 773 (1979).* Two instructions cover the broker's duty of good faith. Instruction No. 43.060 deals with good faith generally; Instruction No. 43.070 relates to the situation where a broker represents parties with adverse interests.

Instruction No. 43.080 concerns the liability of a seller to pay a broker's commission if the sale is not concluded because the seller is unable to get a co-owner to sign the contract.

No issue, finding, or burden-of-proof instructions are included in this chapter. The models provided in Chapter 3, Issues, Burden of Proof and Finding Instructions, or Chapter 45, Contracts, can be easily adapted to cases involving brokers.

## Instruction No. 43.000
## General Agency

**A real estate broker is entitled to his commission when he produces a purchaser ready, willing and able to buy on the terms authorized by or on terms acceptable to the seller.**

**If a broker has done this, he is entitled to his commission even if** [he did not conduct the final negotiations for the sale of the property; the seller accepted a price less than the listed price; the seller failed to complete the sale; the seller did not accept the offer]**.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Kuga v. Chang, 241 Va. 179, 182–83, 399 S.E.2d 816, 818–19 (1991)*; *Adelman v. Caputi, 212 Va. 94, 99, 181 S.E.2d 608, 611–12 (1971)*; *Reiber v. James M. Duncan, Jr. & Assocs., 206 Va. 657, 660–61, 145 S.E.2d 157, 160 (1965)*; *Hensley v. Moretz, 197 Va. 440, 445, 90 S.E.2d 183, 186 (1955)*; *R.A. Poff & Co. v. Ottaway, 191 Va. 779, 785, 62 S.E.2d 865, 868 (1951)*; *Kingsland Land Corp. v. Lange, 191 Va. 256, 261–62, 60 S.E.2d 872, 874–75 (1950)*; *Richeson v. Wilson, 187 Va. 536, 543–45, 47 S.E.2d 393, 396–97 (1948)*; *Edwards v. Cragg, 188 Va. 564, 568–69, 50 S.E.2d 281, 282–83 (1948)*; *Wilson v. Schmidt & Wilson, Inc., 184 Va. 642, 649–53, 35 S.E.2d 737, 740–41 (1945)*; *Blankenship v. Childress, 183 Va. 13, 21, 31 S.E.2d 302, 305 (1944)*; *Bear v. Parrish, 148 Va. 754, 758–59, 139 S.E. 488, 489 (1927)*; *Realty Co. of Virginia. v. Burcum, 129 Va. 466, 475–76, 106 S.E. 375, 378 (1921)*; *Foltz v. Conrad Realty Co., 131 Va. 496, 505–08, 109 S.E. 463, 467–68 (1921)*; *Baylor v. Hoover, 131 Va. 435, 439–41, 109 S.E. 578, 579–80 (1921)*; *Low Moor Iron Co. v. Jackson, 117 Va. 76, 81–82, 84 S.E. 100, 102 (1915)*; *Leonard v. Vaughan & Co., 117 Va. 514, 516–19, 85 S.E. 471, 472–73 (1915)*; *Middle Atl. Immig. Co. v. Ardan, 115 Va. 148, 154–56, 78 S.E. 588, 591 (1913)*; *Paschall & Gresham v. Gilliss, 113 Va. 643, 643, 75 S.E. 220, 220 (1912)*.

## Practice Commentary

A real estate broker is the procuring cause of a sale and entitled to a commission when he has originated or caused a series of events which, without break in continuity, result in a purchaser ready, willing and able to buy on the seller's terms. *Shalimar Dev., Inc. v. FDIC, 257 Va. 565, 570, 515 S.E.2d 120, 122 (1999)*.

The second paragraph of the instruction will have to be altered or eliminated based on the facts of the case.

**General Principles.** The broker has the burden of proving that a contract exists, when that is an issue, and that he has produced a qualified purchaser. The general issue-and-allocation-of-burden-of-proof instruction, Instruction No. 3.000, Negligence: Issues and Allocation of Burdens of Proof, can be readily adapted to a broker commission case.

"Ready, willing and able" is defined in Instruction No. 43.050, Definition of Ready, Willing and Able. Under a general agency contract, a broker is not required to procure a written contract for sale of the property. *Low Moor Iron Co., 117 Va. at 81–82, 84 S.E. at 102*; *Baylor, 131 Va. at 439–40, 109 S.E. at 579–80*; *Richeson, 187 Va. at 543–44, 47 S.E.2d at 396–97*.

Difficulties often arise when the broker is not involved in the final negotiations for sale and the seller, in order to make the sale, accepts a price less than he originally asked the broker to obtain. *Blankenship, 183 Va. at 21, 31 S.E.2d at 305*; *Edwards, 188 Va. at 568–69, 50 S.E.2d at 282–83*. Under a general agency contract, the broker has earned his commission if he is the procuring cause of the sale even if it is the seller who actually consummates the sale. Instruction No.

43.020, Procuring Cause: General. The broker is entitled to his commission if the contract is implied in fact or to "reasonable, fair and just" compensation if his contract is implied in law. See *Paschall & Gresham, 113 Va. at 643, 75 S.E. at 220.*

Extending this principle, *Adelman, 212 Va. at 97–99, 181 S.E.2d at 610–12*, held that a broker is entitled to compensation when he produces an offer "substantially in accordance" with the listing. The oral listing agreement in *Adelman* covered only the price of the property and the broker's commission; the offer provided detailed terms for the transaction. Since none of the terms of the offer contravened the oral listing, the court found that the broker had performed his contract and was entitled to compensation.

A broker is entitled to his commission if the sale is consummated by court-ordered specific performance. *Bissett Realty, Inc. v. Moyer, 223 Va. 475, 478, 290 S.E.2d 851, 852 (1982).*

A broker's right to a commission is not defeated when the parties effect the sale by a transfer of stock rather than by a conveyance if the stock transfer is substantially the equivalent of the sale the broker was employed to make. *Burruss Timber Co. v. Frith, 228 Va. 701, 704–05, 324 S.E.2d 679, 681 (1985).*

If a broker is otherwise entitled to a commission, he will not lose it because the seller did not know that the broker procured the purchaser. The fact that the purchaser told the seller that he was under no obligation to the broker does not relieve the seller. *Burcum, 129 Va. at 466, 106 S.E. at 375.*

**Special Contract of Sale.** When a broker is employed to sell under specific conditions, he is a special agent, as distinguished from a general agent. As a special agent, the broker is not entitled to a commission until he performs the express or specific conditions in the contract. *Quality Home Builders v. Herrick, 210 Va. 723, 727–28, 173 S.E.2d 846, 849–50 (1970)*; *Edwards, 188 Va. at 568–69, 50 S.E.2d at 282–83*; *Wilson v. Schmidt & Wilson, Inc., 184 Va. 642, 651–52, 35 S.E.2d 737, 741 (1945)*; *Leicht-Benson Corp. v. Stone & Co., 138 Va. 511, 517, 121 S.E. 883, 885 (1924)*; *Caldwell v. Tannehill, 117 Va. 11, 18–20, 84 S.E. 6, 8–9 (1915).*

**Where Sale is not Consummated.** As a general rule, when the broker has acted in good faith, the purchaser's subsequent financial inability to pay the seller will not defeat the broker's claim. *Middle Atl. Immig. Co., 115 Va. at 157–58, 78 S.E. at 588*; *Kingsland Land Corp., 191 Va. at 261–62, 60 S.E.2d at 874–75*; *Parker, 191 Va. at 710, 62 S.E.2d at 862*; *Kuga, 241 Va. at 182–83, 399 S.E.2d at 818–19.*

The fact that the sale is not consummated does not deprive the broker of his commission unless the failure to complete the sale is the broker's fault. *Reiber, 206 Va. at 657, 145 S.E.2d at 157*, see also *Hensley, 197 Va. at 440, 90 S.E.2d at 183* (absent a differing provision in the listing agreement, where a broker procures a ready, willing and able buyer, he has earned his commission even though the sale does not take place). For example, the seller's acceptance of the purchaser must not have been induced by the broker's misrepresentations. See Instruction No. 43.060, Broker's Good Faith: Generally; *R. A. Poff & Co., 191 Va. at 785, 62 S.E.2d at 865.*

For a discussion of the prevention doctrine in a suit by a broker to obtain a commission when the contemplated sale did not occur, see *Rastek Construction & Development Corporation v. General Land Commercial Real Estate Company, LLC, 294 Va. 416, 425–32, 806 S.E.2d 740, 745–49 (2017).*

**Termination or Expiration of Contract.** If a broker has an open-ended contract, the principal can terminate it in good faith, complete a sale, and not be liable to the broker. If the seller terminates the contract arbitrarily, capriciously, or in bad faith, to avoid paying a commission, however, he is liable to the broker. See *Hawthorne v. Hannowell, 202 Va. 70, 76–77, 115 S.E.2d 889, 893–94 (1960)*; *Bear, 148 Va. at 758–59, 139 S.E. at 489*; *Patton, Temple & Williamson, Inc. v. Garnett, 147 Va. 1009, 1015–16, 133 S.E. 495, 496–97 (1926)*; *Palmer v. Showalter, 126 Va. 306, 315–17, 101 S.E. 136, 139 (1919).*

If a broker's agency contract expires, or if a contract for an indefinite duration is terminated in good faith, the broker generally will not be entitled to a commission when there is a subsequent sale. *Ford, 191 Va. at 103–04, 59 S.E.2d at 870.* However, if the broker can prove he was the procuring cause of the sale, before the expiration or termination, or that he was the procuring cause of the sale under an implied brokerage contract existing after the expiration or termination, he is entitled to his commission. See Instruction No. 43.020, Procuring Cause: General.

***ALERTS:***

- A broker's right to a commission must be based upon a valid contract, express or implied. *Ford, 191 Va. at 102, 59 S.E.2d at 869.* This instruction assumes that the existence of a contract is not an issue. If there is an issue whether there was an employment contract, this instruction must be supplemented. See Instruction No. 43.010, Implied Brokerage Contract, and Chapter 45, Contracts.
- This instruction applies only to general brokerage contracts. If the broker entered into a special contract in which the commission was expressly predicated on a condition precedent, see the discussion about special contracts in the practice commentary.
- A real estate broker must be licensed in Virginia before he can recover a commission. Va. Code Ann. § 54.1-2106.1; *State Realty Co. v. Wood, 190 Va. 321, 323–25, 57 S.E.2d 102, 103–04 (1950).* Because this issue will rarely be presented to a jury, no instruction is offered. For relevant definitions of the terms used in Va. Code Ann. § 54.1-2106.1, see Va. Code Ann. § 54.1-2100 defining "real estate broker," Va. Code Ann. § 54.1-2101 defining "real estate salesperson," and Va. Code Ann. § 54.1-2103 defining persons exempt.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.010
## Implied Brokerage Contract

**A broker has an implied contract for his services if:**

**(1)** **he** [found a purchaser ready, willing and able to buy; procured the sale of] **the property; and**

**(2)** **he did so under circumstances which gave the** [seller; owner] **reason to believe that he expected to be paid; and**

**(3)** **the** [seller; owner] **accepted him as his real estate broker.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Korzendorfer Realty, Inc. v. Hawkes, 211 Va. 534, 537–538, 178 S.E.2d 524, 526 (1971)*; *Ford v. Gibson, 191 Va. 96, 102–04, 59 S.E.2d 867, 869–70 (1950)*; *Shea Realty Corp. v. Page & Taylor, 111 Va. 490, 491–493, 69 S.E. 327, 327–328 (1910)*.

### PRACTICE COMMENTARY

"In order to establish an implied contract, [the brokers] must show that they performed services which were the procuring cause of the sale, and under such circumstances as to give the owner reason to believe they were performed with the expectation of compensation, not done gratuitously or for some other person; that is, there must be evidence enough to show that the owner accepted them as his agents." *Ford, 191 Va. at 102–03, 59 S.E.2d at 870.*

In *Ford*, a broker continued to work for the owner to sell his property after the contract had expired. The court held that he was a volunteer who could not recover a commission merely because he originally introduced the owner to the customer who eventually bought the property. *Id. at 104, 59 S.E.2d at 870.*

Only where an owner accepts the services of a broker is a contract to pay a reasonable commission implied. *Shea Realty Corp., 111 Va. at 492–493, 69 S.E. at 328* (finding the broker entitled to *quantum meruit* compensation).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.020
## Procuring Cause: General

**To earn his commission, a broker must have been the predominant, procuring cause of the sale. This means that he must have been responsible for causing a series of events which, without a break in their continuity,** [produced a purchaser ready, willing and able to buy on the seller's terms; resulted in a completed sale]**.**

**If the services of a broker are the predominant procuring cause of the sale, then he is entitled to his commission even if the seller completes the sale directly with the buyer.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Shalimar Dev., Inc. v. FDIC, 257 Va. 565, 570, 515 S.E.2d 120, 123 (1999)*; *Edmonds v. Coldwell Banker Residential Real Estate Servs., 237 Va. 428, 432, 377 S.E.2d 443, 445 (1989)*; *Ford v. Gibson, 191 Va. 96, 102–04, 59 S.E.2d 867, 869–70 (1950)*; *Realty Co. of Virginia. v. Burcum, 129 Va. 466, 475–76, 106 S.E. 375, 378 (1921)*; *Paschall & Gresham v. Gilliss, 113 Va. 643, 643, 75 S.E. 220, 220 (1912)*; *Shea Realty Corp. v. Page & Taylor, 111 Va. 490, 492–93, 69 S.E. 327, 328 (1910).*

## PRACTICE COMMENTARY

This instruction is typically used when a broker does not have an exclusive contract and the seller completes the transaction directly with someone who has had some contact with the broker. In contrast, Instruction No. 43.000, General Agency, is most often used where no sale takes place because either the buyer or the seller backs out after having once been interested. Also compare Instruction No. 43.030, Procuring Cause: Known Rival Brokers, and Instruction No. 43.040, Procuring Cause: Unknown Rival Brokers.

"A real estate broker is the procuring cause of a sale when it has 'originated or caused a series of events which, without break in their continuity, result in the accomplishment of the prime object of its employment, which is, usually, to procure a purchaser ready, willing and able to buy on the owner's terms.' " *Edmonds, 237 Va. at 432, 377 S.E.2d at 445* (quoting *Ford, 191 Va. at 103, 59 S.E.2d at 870*).

Depending on the nature of the agreement between the broker and the seller, the series of events which leads to the sale may include the broker's efforts in bringing the property to the buyer's attention, in introducing the eventual buyer to the owner, or in giving the owner the names of possible buyers. *Paschall & Gresham, 113 Va. at 652, 75 S.E. at 225.*

"Whether a broker's services are the procuring cause of a sale is usually a question of fact depending on the circumstances of the particular case." *Atkinson v. S.L. Nusbaum & Co., 191 Va. 82, 90, 59 S.E.2d 857, 860 (1950).* The burden of proof on this issue is on the broker seeking to recover his commission. *Id. at 91, 59 S.E.2d at 860.*

☞ ***PRACTICE POINTER:*** If the broker agreed to procure a sale of the property, his efforts must go beyond finding a buyer or introducing him to the owner. *Shea Realty Corp., 111 Va. at 492–493, 69 S.E. at 328.*

## *ALERTS:*

- This instruction must not be used out of context: there must (1) be an express or implied contract, and (2) the broker must have fulfilled the express terms or have produced a ready, willing and able buyer. Usually these are not in issue in a case where this instruction is appropriate; the question is simply whether the buyer

surfaced as a result of the broker's efforts or the seller's efforts.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.030
## Procuring Cause: Known Rival Brokers

**When a seller enters into nonexclusive contracts with two or more brokers and they know of each other's employment, then the broker who first produces to the seller a purchaser ready, willing and able to complete the purchase on the terms specified in the listing contract or thereafter agreeable to the seller is entitled to the commission.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Atkinson v. S.L. Nusbaum & Co., 191 Va. 82, 89–93, 59 S.E.2d 857, 860–862 (1950)*; *Cannon v. Bates, 115 Va. 711, 718, 80 S.E. 581, 583 (1913).*

### PRACTICE COMMENTARY

Compare this instruction with Instruction No. 43.020, Procuring Cause: General, and Instruction No. 43.040, Procuring Cause: Unknown Rival Brokers, to determine which instruction or instructions should be given.

"[W]here two or more brokers are employed and they know of each other's employment and one of them is not more favored than another by the principal, he may sell to the purchaser who is first produced, and the broker producing such purchaser is entitled to the commissions." *Cannon, 115 Va. at 718, 80 S.E.2d at 583.*

### *ALERTS:*

See the Alerts to Instruction No. 43.020.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.040
## Procuring Cause: Unknown Rival Brokers

**Where a seller employs two brokers to find a purchaser for the property and they are ignorant of each other's employment, the broker whose efforts were the predominant procuring cause of the sale is entitled to the commission even though the other may have rendered services without which the result would not have been reached.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Atkinson v. S.L. Nusbaum & Co., 191 Va. 82, 89–93, 59 S.E.2d 857, 860–862 (1950)*; *Cannon v. Bates, 115 Va. 711, 716–17, 80 S.E. 581, 583 (1913).*

### PRACTICE COMMENTARY

Compare this instruction with Instruction No. 43.020, Procuring Cause: General, and Instruction No. 43.030, Procuring Cause: Known Rival Brokers, to determine which instruction or instructions should be given.

### *ALERTS:*

- See the Alerts for Instruction No. 43.020.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.050
## Definition of Ready, Willing and Able

**A purchaser is ready, willing and able to buy if he wants to buy and if, at the time he is produced to the seller, he has the ability to obtain any necessary financing at the** [closing; settlement]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Glascock v. James, 183 Va. 561, 572, 32 S.E.2d 734, 739 (1948)*; *Low Moor Iron Co. v. Jackson, 117 Va. 76, 82, 84 S.E.100, 102 (1915).*

### PRACTICE COMMENTARY

Frequently, a purchaser who once was ready, willing and able to buy ultimately fails to buy for any number of reasons—from change of heart to financial inability—that develop after he was procured but before the closing. Under a general agency contract, the broker is entitled to his commission from the seller even if the sale never goes through. The fact that most brokers do not sue because of a desire to maintain good business relationships does not alter the fact that there is a right to sue. If the broker does sue, whether the seller has a right to relief from the buyer depends upon whether there was a contract between them. See Chapter 45, Contracts.

Similarly, a special agency contract that requires the broker to produce a signed purchase contract has been fulfilled once the contract is signed even if the sale is never completed. See *Parker v. West, 191 Va. 710, 714–15, 62 S.E.2d 862, 864 (1951); Middle Atl. Immig. Co. v. Ardan, 115 Va. 148, 154–155, 78 S.E. 588, 591 (1913).* Particularly where there is a special agency contract, the terms of that contract will usually determine when the broker has done enough to earn his commission. Since the seller has a signed contract with the buyer, he should be able to sue the buyer for breach of contract if he is sued by the broker. See Chapter 45, Contracts.

Financial ability to perform may only require that the purchaser make preparations for payment to be forthcoming contemporaneously with receiving the deed. *Glascock* found that a purchaser is "ready, able and willing to complete the deal, although a part of the money comes from one who at the same moment receives a mortgage of the newly purchased premises." *Glascock, 183 Va. at 572, 32 S.E.2d at 739.*

☞ ***PRACTICE POINTER:*** Ordinarily, the burden of showing that the purchaser is "able, ready and willing" to buy rests on the broker. *Jackson, 117 Va. at 82, 84 S.E. at 102.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

**Instruction No. 43.060**
**Broker's Good Faith: Generally**

**A broker has a duty to deal with the seller in good faith. The broker is not entitled to a commission if he failed to disclose to the seller all facts within his knowledge that might have influenced the seller in his decision to sell.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 54.1-2131, 54.1-2132, 54.1-2144.

**CASE AUTHORITY:** *Firebaugh v. Hanback, 247 Va. 519, 525–26, 443 S.E.2d 134, 137 (1994)*; *Long & Foster Real Estate, Inc. v. Clay, 231 Va. 170, 173–75, 343 S.E.2d 297, 299–300 (1986)*; *Burruss v. Green Auction & Realty Co., 228 Va. 6, 10, 319 S.E.2d 725, 727 (1984)*; *Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 308 S.E.2d 123 (1983)*; *H-B Ltd. P'ship v. Wimmer, 220 Va. 176, 180, 257 S.E.2d 770, 773–774 (1979)*; *R.A. Poff & Co. v. Ottaway, 191 Va. 779, 785, 62 S.E.2d 865, 868 (1951)*; *Mitchell v. Hughes, 143 Va. 393, 402–03, 130 S.E. 225, 228–29 (1925)*; *Doswell v. Thompson, 143 Va. 777, 780, 783–85, 129 S.E. 684, 684–86 (1925)*; *Barnard v. Gardner Inv. Corp., 129 Va. 346, 353, 106 S.E. 346, 348 (1921)*; *Cardozo v. Middle Atl. Immig. Co., 116 Va. 342, 360–61, 82 S.E. 80, 87 (1914)*.

## PRACTICE COMMENTARY

This instruction can be applicable to either a buyer or a seller depending upon which is the broker's principal.

Because of the fiduciary relationship between them, a broker must deal with his principal in good faith. He must disclose all facts fully and frankly even though the principal might have known or had means of knowing all the facts. *R.A. Poff & Co., 191 Va. at 785, 62 S.E.2d at 868*; *Mitchell, 143 Va. at 402–03, 130 S.E. at 228–29*; *Doswell, 143 Va. at 783–85, 129 S.E. at 684–86*.

The broker also has a "duty of explanation" if reason exists to believe that the client does not understand material terms of a contract. *Long & Foster, 231 Va. at 173–175, 343 S.E.2d at 299–300*.

## *ALERTS:*

- The common law of agency in real estate brokerage relationships inconsistent with Va. Code Ann. § 54.1-2130 et seq. has been abrogated by statute. Va. Code Ann. § 54.1-2144. See Va. Code Ann. §§ 54.1-2131 and 54.1-2132 for the statutory duties of real estate brokers and agents.

## *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.070
## Broker's Good Faith: Adverse Interests

**If someone acts as a broker for both the seller and the buyer in the same transaction without the informed written consent of both seller and buyer, then the sale may be cancelled by either seller or buyer, and the broker is not entitled to a commission.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 54.1-2139, 54.1-2144.

**CASE AUTHORITY:** *Firebaugh v. Hanback, 247 Va. 519, 525–26, 443 S.E.2d 134, 137 (1994)*; *Long & Foster Real Estate, Inc. v. Clay, 231 Va. 170, 173–75, 343 S.E.2d 297, 299–300 (1986)*; *Burruss v. Green Auction & Realty Co., 228 Va. 6, 10, 319 S.E.2d 725, 727 (1984)*; *Virginia Real Estate Comm'n v. Bias, 226 Va. 264, 268–69, 308 S.E.2d 123, 125–126 (1983)*; *H-B Ltd. P'ship v. Wimmer, 220 Va. 176, 180, 257 S.E.2d 770, 773–774 (1979)*; *R.A. Poff & Co. v. Ottaway, 191 Va. 779, 785, 62 S.E.2d 865, 868 (1951)*; *Doswell v. Thompson, 143 Va. 777, 783–85, 129 S.E. 684, 686 (1925)*; *Mitchell v. Hughes, 143 Va. 393, 402–03, 130 S.E. 225,228–29 (1925)*.

### PRACTICE COMMENTARY

This instruction can be applicable to either a buyer or a seller depending upon which is the broker's principal.

Because of the fiduciary relationship between them, a broker must deal with his principal in good faith. He must disclose all facts fully and frankly even though the principal might have known or had means of knowing all the facts. *R.A. Poff & Co., 191 Va. at 785, 62 S.E.2d at 868*; *Mitchell, 143 Va. at 402–03, 130 S.E. at 228–29*; *Doswell, 143 Va. at 783–85, 129 S.E. at 684–86*.

Va. Code Ann. § 54.1-2139 sets forth the requirements for dual agency and dual representation. It provides that the broker is required to obtain the written consent of all clients to the transaction if he is serving as broker for both the buyer and the seller.

The broker also has a "duty of explanation" if reason exists to believe that the client does not understand the material terms of a contract. *Long & Foster, 231 Va. at 173–75, 343 S.E.2d at 299–300*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

## Instruction No. 43.080
## Seller Not Sole Owner

**An owner who lists property with a real estate broker is liable to him for his commission when the broker produces a purchaser ready, willing and able to buy on the terms** [authorized by; acceptable to] **the seller. This is true even though the sale cannot be consummated because the owner is not the sole owner and the other co-owners of the property refuse to sign the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Reiber v. James M. Duncan, Jr., & Assocs., 206 Va. 657, 661–62, 145 S.E.2d 157, 160–61 (1965)*; *Price v. Francis, 184 Va. 484, 489–91, 35 S.E.2d 823, 825–26 (1945)*; *Boston v. De Jarnette, 153 Va. 591, 599, 151 S.E. 146, 148 (1929)*; *Bukva v. Matthews, 149 Va. 500, 516–17, 140 S.E. 674, 679–80 (1927)*.

### PRACTICE COMMENTARY

This is a variation on the situations presented in Instruction No. 43.000, General Agency. It is another example of a situation where the broker claims he has earned a commission even though the sale is not completed.

The format of Instruction No. 43.000 is altered here to emphasize the listing owner's liability for the commission, rather than the broker's entitlement to the commission, to avoid creating the impression that the other owners are liable for the commission.

### *ALERTS:*

- As in all broker suits, the terms of the contract, whether they create a general agency or require specific acts, may be crucial.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA § 19-10

Kent Sinclair, VIRGINIA REMEDIES §§ 8-5, 8-6, 57-4, 61-2

MICHIE'S JURISPRUDENCE, Brokers §§ 1 through 42

# Chapter 44

# COMPROMISE AND SETTLEMENT

## Scope Note


**Instruction No. 44.000** **Contractual Settlements**

**Instruction No. 44.010** **Accord and Satisfaction—Uniform Commercial Code**

**Instruction No. 44.015** **Accord and Satisfaction—Non-Uniform Commercial Code**

**Instruction No. 44.020** **Rescission of Agreement for Fraud**

**Instruction No. 44.030** **Compromise Negotiations Are Not Evidence of Liability**

# SCOPE NOTE

This chapter includes instructions on compromise and on accord and satisfaction.

A compromise is an agreement between two or more persons to settle a dispute. An accord and satisfaction is a satisfaction of a contractual obligation with performance other than that required by the contract. Both compromise and accord and satisfaction are based upon contractual concepts. The parties must agree on the terms and conditions of the compromise settlement of their dispute and the parties must agree that the substitute performance is acceptable as a full satisfaction of the contractual obligation in an accord and satisfaction. Both are common law doctrines; there is a substantial amount of overlap. Contractual (compromise) settlements are covered by Instruction No. 44.000.

Instruction No. 44.010 covers statutory accord and satisfaction by use of an instrument under the UCC, Va. Code Ann. § 8.3A-311. Instruction No. 44.015 relates to statutory accord and satisfaction under Va. Code Ann. § 11-12. An instruction is not provided on common law accord and satisfaction since, if neither statute applies, the agreement is a compromise covered by Instruction No. 44.000. Common law accord and satisfaction is mentioned in the Practice Commentary to Instruction Nos. 44.000 and 44.015.

Because compromise and accord and satisfaction are contractual doctrines, some cases will need instructions from Chapter 45, Contracts, as well as from this chapter.

Frequently, an attorney is involved in compromise negotiations. If so, the attorney's authority to settle may be an issue. Instruction No. 42.020, Scope of Attorney's Authority and the materials accompanying it, cover that specific circumstance. Even if the attorney does not have express authority to settle, however, he may effect a resolution of a case by stipulating the facts or otherwise controlling the conduct of the litigation. See *Snyder-Falkinham v. Stockburger, 249 Va. 376, 381–82, 457 S.E.2d 36, 39 (1995), and Harris v. Diamond Const. Co., 184 Va. 711, 722, 36 S.E.2d 573, 578 (1946).* See also *Christy v. Atchison, Topeka & Santa Fe Ry., 233 F. 255, 256–57 (8th Cir. 1916)*, for a discussion of the difference between settlements and litigation-ending stipulations.

Instruction No. 44.020 relates to the rescission of a compromise agreement, or an accord and satisfaction, if it has been arrived at by fraud, duress, or mistake. It may be helpful to refer to Chapter 39, Fraud, as well.

Instruction No. 44.030 is a limiting evidentiary instruction. Statements made during compromise negotiations are inadmissible to prove liability but may be admissible to prove an issue other than liability. See also Va. R. Evid. 2:408, Compromise Offers and Conduct or Statements During Negotiations.

Several statutory provisions deal with compromise and settlement. Generally, these statutes will not present questions that require jury instructions. They deal generally with circumstances under which the court must approve compromise agreements. See Va. Code Ann. §§ 8.01-55 (wrongful death claims), 8.01-424 (persons under a disability), 8.01-424.1 (workers compensation), and 8.01-425 (compromises by fiduciaries). The court may not, however, force a settlement upon a person under disability if his guardian rejects the defendant's settlement offer, even though the judge believes it to be

in the best interests of that person. *Gunn v. Richmond Community Hosp., 235 Va. 282, 286, 367 S.E.2d 480, 483 (1988).* A compromise made by a fiduciary without court approval pursuant to Va. Code Ann. § 8.01-425 is voidable, but not void from inception. *Kelly v. R.S. Jones & Assocs., 242 Va. 79, 84, 406 S.E.2d 34, 37 (1991).* A judgment, unsatisfied, against one joint tortfeasor does not bar suit against the others. See Va. Code Ann. § 8.01-443.

A covenant not to sue or release of fewer than all joint tortfeasors releases the rest of the joint tortfeasors only if its terms so provide. Va. Code Ann. § 8.01-35.1; *Llewellyn v. White, 297 Va. 588, 595–96, 831 S.E.2d 494, 497 (2019).*

The application of Va. Code Ann. § 8.01-35.1 (effect of release or covenant not to sue in respect to liability and contribution) upon one who is vicariously liable is discussed in *Thurston Metals & Supply Co. v. Taylor, 230 Va. 475, 483–84, 339 S.E.2d 538, 543 (1986).*

For particular requirements and limitations applicable to the settlement of claims and controversies involving the Commonwealth, see Va. Code Ann. § 2.2-514.

An agreement between the Department of Behavioral Health and Developmental Services (formerly the Department of Mental Health and Mental Retardation) and a patient for a reduction in payments does not constitute a compromise of and settlement of the patient's charges. See Va. Code Ann. § 37.2-717; *Commonwealth, Dep't of Mental Health & Mental Retardation v. Sheriff of Nottoway Cty., 221 Va. 306, 312–13, 269 S.E.2d 815, 819 (1980).*

## Instruction No. 44.000
## Contractual Settlements

**If one party to a dispute offers to settle the dispute and states the terms on which he will settle, and the other party accepts the terms stated, then there is a compromise settlement. You must determine from all the evidence whether the parties agreed on the terms of settlement.**

(Name of proponent) **has the burden of proving by the greater weight of the evidence that there was a compromise settlement.**

[You shall return your verdict for (name of proponent) if he has proved by the greater weight of the evidence that there was a compromise settlement. You shall return your verdict for (name of contestant) if (name of proponent) has failed to prove that there was a compromise settlement.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Alexakis v. Mallios, 261 Va. 425, 429, 544 S.E.2d 650, 652 (2001)*; *Golding v. Floyd, 261 Va. 190, 194, 539 S.E.2d 735, 737–38 (2001)*; *Snyder-Falkinham v. Stockburger, 249 Va. 376, 385, 457 S.E.2d 36, 41 (1995)*; *Montagna v. Holiday Inns, Inc., 221 Va. 336, 347, 269 S.E.2d 838, 844–45 (1980)*; *Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd., 215 Va. 180, 183–84, 207 S.E.2d 858, 860–61 (1974)*.

### PRACTICE COMMENTARY

A compromise is merely a contract; the rules of contract law are applicable. See Chapter 45, Contracts. Compromise is similar to common law accord and satisfaction. A compromise settlement may be oral, unless the contract violates the statute of frauds. *Lindsay v. McEnearney Assocs. 260 Va. 48, 53, 531 S.E.2d 573, 576 (2000)*. An oral compromise that is "subject to" execution of a formal contract is not binding until the contract is executed; however, a compromise that merely contemplates execution of a formal contract is binding. *Golding, 261 Va. at 194, 539 S.E.2d at 737.*

The issue of compromise can arise as a defense to a lawsuit, or it can be tried independently of the lawsuit itself. Use the bracketed finding paragraph when the compromise issue is tried independently.

Remember to include Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence, so that the jury will be able to determine whether the burden of proof referred to in the second paragraph has been satisfied by the proof presented and admitted into evidence.

### *ALERTS:*

- Compromise is different from statutory accord and satisfaction. See Instruction Nos. 44.010 and 44.015.

- If the compromise issue is only one of many in a particular case (e.g., an automobile negligence case), you should alter the basic issue instruction, Instruction No. 3.000, to include compromise and alter the basic finding instruction, Instruction No. 3.050, to instruct the jury on the verdict to return if it believes that there was a compromise.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 10; §§ 15.2, 20.9, 23.32

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 14; *see also* §§ 5.04, 5.06, 21.08, 23.03, 23.12, 23.13, 25.03, 25.05, 26.05, 26.08

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-16, 15-35, 15-38

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, Chapter 18

Kent Sinclair, VIRGINIA REMEDIES §§ 11-3 through 11-5, 33-7, 39-3

MICHIE'S JURISPRUDENCE, Compromise and Settlement §§ 1-15

## Instruction No. 44.010
## Accord and Satisfaction—Uniform Commercial Code

**Payment by** (name of debtor) **through an** [instrument; check] **of an amount less than the amount claimed is in full satisfaction of the debt if** (name of debtor) **proves by the greater weight of the evidence that:**

**(a) the payment is tendered in good faith as full satisfaction of the claim;**

**(b) the amount of the claim was [unliquidated; subject to a good faith dispute];**

**(c) the** [instrument; check] **either contains or is accompanied by a written communication that states in words that are clearly noticeable that the** [instrument; check] **is made in full satisfaction of the claim; and**

**(d) the payee obtained payment on the** (instrument; check)**.**

[A(n) [instrument; check] is not tendered in good faith when offered for payment of a loan if: (1) the check is for less than is due under the terms of the loan agreement; and (2) the check is tendered to [an agent; an employee; a person associated or affiliated with the creditor] who lacks knowledge of a dispute concerning the loan.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.3A-104, 8.3A-311.

**CASE AUTHORITY:** *Helton v. Phillip A. Glick Plumbing, Inc., 277 Va. 352, 357–58, 672 S.E.2d 842, 844 (2009)*; *Johnston v. First Union National Bank, 271 Va. 239, 245, 624 S.E.2d 10, 13 (2006)*; *Gelles & Sons Gen. Contracting, Inc. v. Jeffrey Stack, Inc., 264 Va. 285, 289–90, 569 S.E.2d 406, 408 (2002)*; *John Grier Constr. Co. v. Jones Welding & Repair, Inc., 238 Va. 270, 272–73, 383 S.E.2d 719, 721 (1989)*.

### PRACTICE COMMENTARY

This instruction follows the statutory requirements of Va. Code Ann. § 8.3A-311. The instruction should be changed as necessary if either subsection (c) or (d) of the statute applies.

Va. Code Ann. § 8.3A-311 applies in commercial code transactions where an instrument or an accompanying written communication contains a conspicuous statement that the instrument (i.e., check) was tendered as full satisfaction. *Gelles, 264 Va. at 289–90, 569 S.E.2d at 408*. An accord and satisfaction occurs even if the creditor marks out words "Paid in Full" and cashes the check. *Helton, 277 Va. at 357–58, 672 S.E.2d at 844*. However, Va. Code Ann. § 8.3A-311 is not applicable where a commercial instrument is not presented in good faith as defined by Va. Code Ann. § 8.3A-103(4). *Johnston, 271 Va. at 245, 624 S.E.2d at 13*.

The "greater weight of the evidence" is defined in Instruction No. 3.100.

Va. Code Ann. § 8.3A-104(b) defines "instrument" under the Uniform Commercial Code.

Accord and satisfaction requires a knowing acceptance of the offer made. *John Grier Constr. Co. v. Jones Welding & Repair, Inc., 238 Va. 270, 272–73, 383 S.E.2d 719, 721 (1989)*.

For an accord and satisfaction not based upon the Uniform Commercial Code see Instruction No. 44.015.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 10; §§ 15.2, 20.9, 23.32

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 14; *see also* §§ 5.04, 5.06, 21.08, 23.03, 23.12, 23.13, 25.03, 25.05, 26.05, 26.08

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-16, 15-35, 15-38

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, Chapter 18

Kent Sinclair, VIRGINIA REMEDIES §§ 11-3 through 11-5, 33-7, 39-3

MICHIE'S JURISPRUDENCE, Compromise and Settlement §§ 1-15

## Instruction No. 44.015
## Accord and Satisfaction—Non-Uniform Commercial Code

**Payment by a debtor of an amount less than the amount claimed by the creditor, when expressly accepted by the creditor in satisfaction and made pursuant to an agreement for that purpose, extinguishes the debt. This is called an accord and satisfaction.**

**The defendant has the burden of proving by the greater weight of the evidence that there was an accord and satisfaction.**

[You shall return your verdict for the defendant if he has proved by the greater weight of the evidence that he paid the plaintiff an amount of money less than the amount owed to the plaintiff, and that the plaintiff expressly accepted this lesser amount in satisfaction pursuant to an agreement between them.

If you do not so find, then you shall return your verdict consistent with the evidence and the other instructions.]

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 11-12.

**CASE AUTHORITY:** *Kelly v. R.S. Jones & Assocs., 242 Va. 79, 82–83, 406 S.E.2d 34, 36 (1991)*; *Atkins v. Boatwright, 204 Va. 450, 455, 132 S.E.2d 450, 454 (1963)*; *Kasco Mills, Inc., v. Ferebee, 197 Va. 589, 593–94, 90 S.E.2d 866, 870–71 (1956)*; *Virginia-Carolina Electrical Works, Inc. v. Cooper, 192 Va. 78, 80–81, 63 S.E.2d 717, 718–19 (1951)*; *Hibbs v. First Nat'l Bank, 133 Va. 94, 112–13, 112 S.E. 669, 675–76 (1922)*.

### PRACTICE COMMENTARY

Va. Code Ann. § 11-12 "relaxes" the common law. *Hogan v. Callas, 139 Va. 137, 143–44, 123 S.E. 361, 363 (1924)* (decided under prior law).

An accord and satisfaction under Va. Code Ann. § 11-12 requires that there be both an offer and an express acceptance of the suggested satisfaction "by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose[.]" See *Johnson v. First Union Nat'l Bank, 271 Va. 239, 245 n.5, 624 S.E.2d 10, 13 n.5 (2006)*. No accord and satisfaction existed where a creditor notified the debtor after receiving the check and before depositing it that it was received only as "partial payment," and thereafter endorsed the check with words to that effect. *Atkins, 204 Va. at 455, 132 S.E.2d at 454*. This holding, decided before Va. Code Ann. § 8.3A-311 was enacted, differs from the outcome under the Uniform Commercial Code if a check is tendered in accordance with the provisions of Va. Code Ann. § 8.3A-311. See Instruction No. 44.010 if the case is governed entirely by the provision of the Uniform Commercial Code.

The "greater weight of the evidence" is defined in Instruction No. 3.100. Remember to include this instruction along with Instruction No. 44.015, so that the jury will be able to determine whether the burden of proof referred to in the second paragraph has been satisfied by the proof presented and admitted into evidence.

☞ ***PRACTICE POINTER:*** If the case involves common law accord and satisfaction, you should consider an instruction either based upon Instruction No. 44.000 or Instruction No. 44.015, but using the particular facts of your case.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 10; §§ 15.2, 20.9, 23.32

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 14; *see also* §§ 5.04, 5.06, 21.08, 23.03, 23.12, 23.13, 25.03, 25.05, 26.05, 26.08

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-16, 15-35, 15-38

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, Chapter 18

Kent Sinclair, VIRGINIA REMEDIES §§ 11-3 through 11-5, 33-7, 39-3

MICHIE'S JURISPRUDENCE, Compromise and Settlement §§ 1-15

**Instruction No. 44.020**
**Rescission of Agreement for Fraud**

**A settlement arrived at by** [fraud; duress; mistake] **is not binding on the parties. Such a settlement is not a defense to a lawsuit.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Murayama 1997 Trust v. NISC Holdings, L.L.C., 284 Va. 234, 245–46, 727 S.E.2d 80, 86 (2012)*; *Alexakis v. Mallios, 261 Va. 425, 430, 544 S.E.2d 650, 652 (2001)*; *Metrocall of Del., Inc. v. Continental Cellular Corp., 246 Va. 365, 373–74, 437 S.E.2d 189, 193–94 (1993)*; *Nationwide Mut. Ins. Co. v. Muncy, 217 Va. 916, 920–21, 234 S.E.2d 70, 72–73 (1977)*; *Nationwide Mut. Ins. Co. v. Martin, 210 Va. 354, 357–58, 171 S.E.2d 239, 242 (1969)*.

### PRACTICE COMMENTARY

This principle appears to be equally applicable to compromise by contract and to an accord and satisfaction.

This instruction should be considered in conjunction with instructions dealing with Fraud, Chapter 39; Duress, Instruction No. 45.470; or Undue Influence, Instruction Nos. 45.460 and 48.070.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 10; §§ 15.2, 20.9, 23.32

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 14; *see also* §§ 5.04, 5.06, 21.08, 23.03, 23.12, 23.13, 25.03, 25.05, 26.05, 26.08

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-16, 15-35, 15-38

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, Chapter 18

Kent Sinclair, VIRGINIA REMEDIES §§ 11-3 through 11-5, 33-7, 39-3

MICHIE'S JURISPRUDENCE, Compromise and Settlement §§ 1-15

## Instruction No. 44.030
## Compromise Negotiations Are Not Evidence of Liability

**Statements made by the parties in compromise negotiations are not evidence of liability. These statements are offered to prove only** (name the fact sought to be proven)**, and you should consider them for that purpose only.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Fenter v. Norfolk Airport Authority, 274 Va. 524, 531 n.3, 649 S.E.2d 704, 708 n.3 (2007)*; *Lyle, Siegel, Croshaw & Beale v. Tidewater Capital Corp., 249 Va. 426, 438, 457 S.E.2d 28, 35 (1995)*; *Brickell v. Shawn, 175 Va. 373, 381, 9 S.E.2d 330, 333 (1940)*; *Hendrickson v. Meredith, 161 Va. 193, 204–05, 170 S.E. 602, 606 (1933).*

### PRACTICE COMMENTARY

Generally, an offer to settle or compromise a disputed claim is inadmissible. *Brickell, 175 Va. at 381, 9 S.E.2d at 333.* This evidentiary exclusion is also addressed in Va. R. Evid. 2:408. However, Va. Code Ann. §§ 25.1-204 and 25.1-417 do not require exclusion from evidence of a condemnation appraisal prepared for the Commonwealth and provided to the landowner "before the initiation of negotiations," as required by Va. Code Ann. § 25.1-417(A)(2). See *Ramsey v. Comm'r of Hwys., 289 Va. 490, 496–98, 770 S.E.2d 487, 490–91 (2015).*

### *ALERTS:*

- An admission of an independent fact pertinent to a question at issue or an express admission of liability made during settlement negotiations is admissible. *Lyle, 249 Va. at 438, 457 S.E.2d at 35.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapter 10; §§ 15.2, 20.9, 23.32

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 14; *see also* §§ 5.04, 5.06, 21.08, 23.03, 23.12, 23.13, 25.03, 25.05, 26.05, 26.08

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 7-16, 15-35, 15-38

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE, Chapter 18

Kent Sinclair, VIRGINIA REMEDIES §§ 11-3 through 11-5, 33-7, 39-3

MICHIE'S JURISPRUDENCE, Compromise and Settlement §§ 1-15

# Chapter 45

# CONTRACTS

## Scope Note


**Instruction No. 45.000** **Issues and Burden of Proof**

**Instruction No. 45.005** **Issues and Allocations of Burden of Proof: Third-Party Case**

**Instruction No. 45.010** **Definition of Contract**

**Instruction No. 45.020** **Offer**

**Instruction No. 45.030** **Acceptance**

**Instruction No. 45.040** **Consideration**

**Instruction No. 45.050** **Specified Time for Acceptance**

**Instruction No. 45.060** **No Time Specified for Acceptance**

**Instruction No. 45.070** **Communication of Acceptance**

**Instruction No. 45.080** **Acceptance Must Match Offer**

**Instruction No. 45.090** **Meeting of the Minds**

**Instruction No. 45.100** **Counteroffer**

**Instruction No. 45.110** **Withdrawing an Offer**

**Instruction No. 45.120** **Adequacy of Consideration**

**Instruction No. 45.130** **Performing Prior Legal Duty Not Consideration**

**Instruction No. 45.140** **Past Act Not Consideration**

**Instruction No. 45.150** **Not Suing as Consideration**

**Instruction No. 45.160** **Competence of Parties to Contract**

**Instruction No. 45.170** **Contract Must Be Complete and Reasonably Certain**

**Instruction No. 45.180** **Mutuality of Obligation**

**Instruction No. 45.190** **Intent**

**Instruction No. 45.200** **Express Contract**

**Instruction No. 45.210** **Implied Contract**

**Instruction No. 45.230** **Implied Promise to Pay for Services**

**Instruction No. 45.300** **Contract Construed as a Whole**

**Instruction No. 45.305** **Ordinary Meaning of Words**

**Instruction No. 45.310** **Construction Against the Drafter**

**Instruction No. 45.320** **Contract Interpretation: Ejusdem Generis**

**Instruction No. 45.330** **Practical Construction by the Parties**

**Instruction No. 45.340 Custom and Usage of Trade**
**Instruction No. 45.400 Material Breach of Contract**
**Instruction No. 45.410 Waiver**
**Instruction No. 45.420 Modification**
**Instruction No. 45.430 Mutual Rescission**
**Instruction No. 45.440 Preventing Performance**
**Instruction No. 45.450 Impossibility as Defense**
**Instruction No. 45.460 Undue Influence**
**Instruction No. 45.470 Duress**
**Instruction No. 45.480 Fraud in the Inducement**
**Instruction No. 45.500 Damages: Direct**
**Instruction No. 45.510 Damages: Reasonable Proof**
**Instruction No. 45.520 Damages: Nominal**
**Instruction No. 45.530 Damages: Consequential**
**Instruction No. 45.540 Damages: Liquidated**
**Instruction No. 45.550 Damages: Duty to Mitigate**
**Instruction No. 45.560 Buyer's Damages: Breach of Contract to Sell Property**
**Instruction No. 45.570 Quantum Meruit**
**Instruction No. 45.600 Finding Instruction**
**Instruction No. 45.610 Finding Instruction: Third-Party Case**

# SCOPE NOTE

***General Observations and Overview***

The instructions in this chapter are more often statements of law to be adapted to the facts of a particular case than actual instructions ready to be given with little alteration. While this is true to some degree of all instructions, it is more often true of these instructions than any others in these volumes.

As an example of how these instructions might be used, consider a fairly typical case: whether the contract has been breached turns on the meaning of a phrase in the contract. Normally, contract interpretation is not a jury issue, but it can be. Suppose, for example, that the contract calls for "regular delivery of fresh, large white eggs." If the contract does not define any of those terms, then the course of dealings between the parties may determine what "regular" delivery is, how fresh is "fresh," how large is "large," and whether "white" really means white or whether it means "white and brown." If the parties do not offer conflicting evidence at trial, then the court can decide the issue; but if they do, then a jury issue is presented. Instruction No. 45.330, Practical Construction by the Parties, is obviously the starting point, but it must be altered so that it guides the jury on the actual issues in dispute. If the potential issues in the egg delivery case suggested above resolve themselves into the single issue of whether the deliveries were regular, and if there is a factual dispute about what the previous course of dealings was, Instruction No. 45.330 might be sent to the jury in this form:

> If you have doubt about the meaning of the term "regular delivery," the conduct of the parties may furnish the proper interpretation. The interpretation by the parties is entitled to great weight. However, any interpretation suggested or supported by the acts of the parties must be reasonable and not in conflict with the actual terms of the contract.

Instruction No. 45.000 provides a sample issues and burden of proof instruction that assumes impossibility to perform was raised as a defense in the case. Instruction No. 45.005 provides an issues and allocations of burden of proof instruction for a third-party case.

The remaining instructions in this chapter are divided into six basic subdivisions: the elements of a contract are defined and elaborated upon in Instruction Nos. 45.010 through 45.190; the types of contract are set forth in Instruction Nos. 45.200 through 45.230; interpretation guides are given in Instruction Nos. 45.300 through 45.340; breach of contract and defenses are covered in Instruction Nos. 45.400 through 45.480; Instruction Nos. 45.500 through 45.570 cover damages; and Instruction Nos. 45.600 and 45.610 are finding instructions that respectively correspond to the issues and burden of proof Instruction Nos. 45.000 and 45.005.

Where the material facts concerning the formation of an alleged contract are not in dispute, the issue of contract *vel non* is a question of law. *Phillips v. Mazyck, 273 Va. 630, 635–36, 643 S.E.2d 172, 175 (2007)*; *Valjar, Inc. v. Maritime Terminals, Inc., 220 Va. 1015, 1018, 265 S.E.2d 734, 736 (1980).*

Contracts may be subject to the Uniform Commercial Code. Va. Code Ann. § 8.2-101 et seq. The entire UCC is supplemented by common law, however, under Va. Code Ann.

§ 8.1A-103(b), which provides:

> Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

For instructions dealing with Products Liability, see instructions in Chapter 34, above. For instructions on the Motor Vehicle Warranty Enforcement Act, Va. Code Ann. § 59.1-207.9 et seq., see Instruction Nos. 34.300, 34.310 and 34.320.

***Punitive Damages Unavailable in Contract***

There is no instruction on punitive damages because they cannot be recovered in a suit for breach of contract absent an independent, willful tort. *Gasque v. Mooers Motor Car Co., 227 Va. 154, 159, 313 S.E.2d 384, 388 (1984)*; *Goodstein v. Weinberg, 219 Va. 105, 109, 245 S.E.2d 140, 143 (1978)*. When the breach of contract amounts to an independent willful tort, a cause of action may exist. When malice, wantonness, or oppression is involved, punitive damages may be claimed. *Worrie v. Boze, 198 Va. 533, 543, 95 S.E.2d 192, 200 (1956)*; *Wright v. Everett, 197 Va. 608, 612–15, 90 S.E.2d 855, 858–59 (1956)*. A bad motive not amounting to a willful, independent tort will not support a claim for punitive damages. However, since election between tort and contract is no longer required, a plaintiff seeking punitive damages may allege a willful, independent tort in a count separate from that alleging a breach of contract. *Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983)*.

***Special Rules Apply to Government Contracts***

An *ultra vires* contract of a municipality, of the Commonwealth, or of a quasi governmental or public services corporation is void *ab initio*. No performance on either side can give it validity or be the foundation of any right of action. It cannot be ratified. The doctrine of estoppel does not apply. *Richard L. Deal & Assocs. v. Commonwealth, 224 Va. 618, 622–23, 299 S.E.2d 346, 348–49 (1983)* (collecting cases). "The doctrine of estoppel cannot be imposed against a government entity when the contract is *ultra vires* and therefore void." *School Bd. of Amherst County v. Burley, 225 Va. 376, 379, 302 S.E.2d 53, 55 (1983)*. However, one who makes a contract with a government entity is estopped to assert that the contract is *ultra vires* when it is sought to be enforced against him. *Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc., 230 Va. 24, 30, 334 S.E.2d 542, 546 (1985)*.

***Contracts by Corporations***

Absent an agreement or acquiescence by all stockholders and directors of a closely held corporation, no executive officer has authority to sell or contract for the sale of the real estate of the corporation, by virtue of his office alone. *WBM, LLC v. Wildwoods Holding Corp., 270 Va. 156, 164, 613 S.E.2d 402, 407 (2005)*; *Mosell Realty Corp. v. Schofield, 183 Va. 782, 790, 33 S.E.2d 774, 777 (1945)*. See also Va. Code Ann. § 13.1-900 (sale of assets other than in regular course of business). However, where all stockholders and directors in a close corporation agreed or acquiesced to negotiating loans, purchasing another motel, and giving deeds of trust, it was held bound by papers executed by the president and secretary without formal authorization. *Lake Motel, Inc.*

*v. Lowery, 224 Va. 553, 560–61, 299 S.E.2d 496, 500 (1983).*

Pursuant to the provisions of Va. Code Ann. § 13.1-629, corporate action may not be challenged on the ground that the corporation lacks or lacked power to act except in three specified circumstances: (1) shareholder actions to enjoin the corporation's act; (2) proceedings by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent; and (3) proceedings against the corporation before the State Corporation Commission. See *Brewer v. First Nat'l Bank, 202 Va. 807, 814–15, 120 S.E.2d 273, 279 (1961)* (decided under prior law). Consent of the officers, directors and stockholders to a corporate act, and the ratification of the act by long acquiescence therein by the corporation precludes any objection of a lack of power in the corporation to perform the act in the first instance. *Id.*

A corporate seal establishes prima facie that the instrument is that of the corporation and that it was executed on authority duly given. *Pascoe Steel Corp. v. Shannon, 224 Va. 530, 533, 298 S.E.2d 97, 98 (1982).*

**Instruction No. 45.000**
**Issues and Burden of Proof**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The issues in this case are:**

**(1) Was there a contract between the parties?**

**(2) If there was, did (name of defendant) breach it?**

**On these issues (name of plaintiff) has the burden of proof.**

**(3) Was the contract impossible to perform?**

**On this issue (name of defendant) has the burden of proof.**

**(4) If (name of plaintiff) is entitled to recover, what is the amount of his damage?**

**On this issue (name of plaintiff) has the burden of proof.**

**Your decisions on these issues must be governed by the instructions that follow.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sager v. Basham, 241 Va. 227, 231, 401 S.E.2d 676, 678 (1991)*; *Simpson v. Scott, 189 Va. 392, 401, 53 S.E.2d 21, 25 (1949)*; *Mullins v. Mingo Lime & Lumber Co., 176 Va. 44, 49, 10 S.E.2d 492, 493–94 (1940)*; *Bloomberg-Michael Furniture Co. v. Coppes Bros. & Zook, 141 Va. 18, 21–22, 126 S.E. 59, 60 (1925)*; *Massie v. Parrish, 140 Va. 717, 731, 125 S.E. 691, 696 (1924), overruled in part by Wingate v. Coombs, 237 Va. 501, 506–07, 379 S.E.2d 304, 306–07 (1989).*

### PRACTICE COMMENTARY

This is a sample instruction for a case in which the existence of a contract, its breach, and the defense of impossibility to perform the contract are assumed to have been raised. The instruction should be modified to exclude or to include all issues and defenses as may be applicable to a particular case.

Use this instruction with the appropriate standard of proof instruction: Instruction No. 3.100, Definition of Greater Weight of the Evidence; or Instruction No. 3.110, Definition of Clear and Convincing Evidence. Both definitions may be necessary if multiple defenses with different standards of proof have been raised.

See Instruction No. 45.600 for a corresponding Finding Instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.005**
**Issues and Allocations of Burden of Proof: Third-Party Case**

**There are two cases being tried by this jury.**

**The first case is** (name of plaintiff) **against** (name of defendant)**. You should decide this case first. In this case, the issues are:**

(1) **Was there a contract between** (name of plaintiff) **and** (name of defendant)**?**

(2) **If there was a contract, did** (name of defendant) **breach the contract?**

(3) **If** (name of defendant) **did breach a contract, what is the amount of damages to** (name of plaintiff) **caused by the breach?**

**On these issues** (name of plaintiff) **has the burden of proof.**

**If, in this case of** (name of plaintiff) **against** (name of defendant) **you reach a verdict in favor of** (name of plaintiff) **against** (name of defendant), **then you must proceed to consider the third party claim of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**. In this third-party case, the issues are:**

(1) **Was there a contract between** (name of third-party plaintiff) **and** (name of third-party defendant) **under which** (name of third-party defendant) **has a duty to perform for** (name of third-party plaintiff) **an act or acts for** (name of plaintiff)**?**

(2) **Did** (name of third-party defendant) **breach such a contract?**

(3) **Did any breach of such contract cause damages to** (name of plaintiff) **for which you have awarded** (name of plaintiff) **a verdict against** (name of third-party plaintiff)**?**

(4) **If** (name of third-party defendant) **did breach a contract with** (name of third-party plaintiff), **and such breach was a cause of all or part of the damages you found** (name of plaintiff) **should recover from** (name of defendant, third-party plaintiff)**, what is the amount of such damages that** (name of defendant, third-party plaintiff) **should recover from** (name of third-party defendant)**?**

**On these issues,** (name of third-party plaintiff) **has the burden of proof.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This instruction is based on Virginia Supreme Court Rule 3:13 (third-party practice) as applied to a contract case involving a single third-party claim, without complicating factors such as cross-claims, counterclaims or third-party claims by plaintiff. The same format can be used to point out the issues when such complicating factors are present in a case. However, the second third-party claim cannot exceed whatever amount the jury has found the first third-party defendant liable for. The same principle would apply to subsequent third-party claims.

The instruction applies to a situation where the defendant, third-party plaintiff, had a contract with the third-party defendant that required the third-party defendant to perform all or part of the contractual obligation of the defendant to the plaintiff. It can be adapted to cover third-party claims which arise in other ways. It can also be adapted for use in negligence cases.

For the unsuccessful assertion of a claim as a third-party beneficiary, see *Environmental Staffing Acquisition Corp. v. B & R Constr. Mgmt., 283 Va. 787, 795, 725 S.E.2d 550, 555 (2012)*; *Caudill v. County of Dinwiddie, 259 Va. 785, 793, 529 S.E.2d 313, 317 (2000)*; *Copenhaver v. Rogers, 238 Va. 361, 366–69, 384 S.E.2d 593, 595–97 (1989)*. For a successful assertion of that status, see *Tingler v. Graystone Homes, Inc., 298 Va. 63, 104–07, 834 S.E.2d 244, 268–70 (2019)*; *Cobert v. Home Owners Warranty Corp., 239 Va. 460, 466–67, 391 S.E.2d 263, 266–67 (1990)*. See Va. Code Ann. § 55.1-119 regarding the right of a third party beneficiary to sue under instrument.

See Instruction No. 45.610 for a corresponding Finding Instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.010
## Definition of Contract

**A contract is an agreement, for consideration, between two or more parties. A contract arises when an offer is accepted.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. §§ 8.2-106, 8.2-201–8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Buchanan v. Doe, 246 Va. 67, 72, 431 S.E.2d 289, 292 (1993)*; *Montagna v. Holiday Inns, Inc., 221 Va. 336, 346, 269 S.E.2d 838, 844 (1980).*

### PRACTICE COMMENTARY

Subsequent instructions expand upon the following: Offer, Instruction No. 45.020; Acceptance, Instruction Nos. 45.030 and 45.050–45.080; and Consideration, Instruction Nos. 45.040 and 45.120–45.150.

### *ALERTS:*

- The parties to the contract must be competent. See Instruction No. 45.160, Competence of Parties to Contract. The contract must be for a legal purpose. *Taylor Thiemann & Aitken v. Hayes, 244 Va. 198, 200, 418 S.E.2d 897, 899 (1992)*; see *Kennedy v. Annandale Boys Club, Inc., 221 Va. 504, 506, 272 S.E.2d 38, 39 (1980).* The elements of competency and legality, while essential, are not usually at issue. If either is in issue, it must be included in this instruction and elaborated on in other instructions.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.020
## Offer

**An offer is a proposal of the terms on which a person will enter into an agreement if that proposal is accepted by the person to whom it is made.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-205, 8.2-206 (contracts under the UCC).

**CASE AUTHORITY:** *Chang v. First Colonial Sav. Bank, 242 Va. 388, 391–92, 410 S.E.2d 928, 930–31 (1991)*; *Richmond Eng'g & Mfg. Corp. v. Loth, 135 Va. 110, 152–53, 115 S.E. 774, 786 (1923).*

### PRACTICE COMMENTARY

Under the objective theory of contract, which prevails in Virginia, an offer has been made if a reasonable man in the offeree's position, in view of the offeror's acts and words and the surrounding circumstances, would believe that the offeror has invited his acceptance. *Chang, 242 Va. at 392, 410 S.E.2d at 930*; *Richmond Eng'g & Mfg. Corp., 135 Va. at 139–53, 115 S.E. at 782–86.*

*Richmond Eng'g & Mfg. Corp.* is the leading case on what constitutes an offer. The Court defined an offer as "a statement by the offerer [sic] that he will give a return for some promise or act of the offeree." *135 Va. at 152–53, 115 S.E. at 786.*

An offer is different from a statement of fact or a statement made in preliminary negotiation. An offer is a promise because it shows a willingness to undertake an obligation. Its chief characteristic is that it is sufficiently certain to enable the trier of fact to determine what the offeror undertakes. *Chang, 242 Va. at 392, 410 S.E.2d at 931.*

☞ ***PRACTICE POINTER:*** For a discussion of offer and acceptance in auctions, see *Holston v. Pennington, 225 Va. 551, 304 S.E.2d 287 (1983).*

If one party has made a general proposal—such as an advertisement—that would subject him to the possibility of being bound by more than one contract, his proposal is not an offer. A. CORBIN, CORBIN ON CONTRACTS § 2.4.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.030**
**Acceptance**

**Acceptance of an offer is a voluntary expression of assent to be bound by the terms of the offer.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-206, 8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Ayers v. Mosby, 256 Va. 228, 234, 504 S.E.2d 845, 848 (1998)*; *Chang v. First Colonial Sav. Bank, 242 Va. 388, 392–93, 410 S.E.2d 928, 930–31 (1991)*; *Metro Realty of Tidewater, Inc. v. Woolard, 223 Va. 92, 99, 286 S.E.2d 197, 200 (1982)*; *Richmond Eng'g & Mfg. Corp. v. Loth, 135 Va. 110, 152, 115 S.E. 774, 786 (1923).*

### PRACTICE COMMENTARY

See Instruction Nos. 45.070, Communication of Acceptance; 45.080, Acceptance Must Match Offer; 45.090, Meeting of the Minds; and 45.100, Counteroffer.

"In the absence of fraud, duress, or mutual mistake, a person having the capacity to understand a written document who reads it, or, without reading it or having it read to her, signs it, is bound by her signature." *Ayers, 256 Va. at 234, 504 S.E.2d at 848*; *Metro Realty, 223 Va. at 99, 286 S.E.2d at 200.*

Acceptance of a novation requires "clear and satisfactory" proof of a "clear and definite intention on the part of all concerned" to discharge a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another. *Honeywell v. Elliott, 213 Va. 86, 89, 189 S.E.2d 331, 334 (1972).*

Acceptance may be by conduct. See *Spectra-4, LLP v. Uniwest Commercial Realty, Inc., 290 Va. 36, 45 n.3, 772 S.E.2d 290, 294 n.3 (2015).*

Also note that while an offer is usually a promise, it is not always. *Chang, 242 Va. at 392, 410 S.E.2d at 931.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.040
## Consideration

**Consideration is what is given in exchange for a promise.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.1A-204 ("Value" under the UCC).

**CASE AUTHORITY:** *Alexakis v. Mallios, 261 Va. 425, 430, 544 S.E.2d 650, 653 (2001)*; *Hamm v. Scott, 258 Va. 35, 38, 515 S.E.2d 773, 774 (1999)*; *GSHH Richmond, Inc. v. Imperial Assocs., 253 Va. 98, 101, 480 S.E.2d 482, 484 (1997)*; *Greenwood Assocs., Inc. v. Crestar Bank, 248 Va. 265, 268, 448 S.E.2d 399, 402 (1994)*; *United Masonry, Inc. v. Riggs Nat'l Bank, 233 Va. 476, 483, 357 S.E.2d 509, 513–14 (1987)*; *Sea-Land Serv., Inc. v. O'Neal, 224 Va. 343, 350, 297 S.E.2d 647, 651 (1982)*; *Brewer v. Bank of Danville, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961)*; *Atlantic & Danville Ry. Co. v. Hooker, 194 Va. 496, 511, 74 S.E.2d 270, 280 (1953)*; *Norris v. Barbour, 188 Va. 723, 736, 51 S.E.2d 334, 339 (1949)*; *Hooff v. Paine, 172 Va. 481, 485, 2 S.E.2d 313, 314 (1939).*

### PRACTICE COMMENTARY

It is fundamental contract law that every promise or agreement must have consideration to support it, or it is unenforceable. Consideration is, therefore, an essential ingredient of a valid contract. *Sager v. Basham, 241 Va. 227, 231, 401 S.E.2d 676, 678 (1991).*

Consideration has been defined to be a benefit to the party promising or a loss or detriment to the party to whom the promise is made. *Brewer, 202 Va. at 815, 120 S.E.2d at 279.* "Consideration is, in effect, the price bargained for and paid for a promise." *Id.* Consideration for a promise may be some act other than a promise, such as a forbearance to do something, the creation, modification or destruction of a legal relation, or a return promise. The consideration must be bargained for and given in exchange for the promise. *Atlantic & Danville Ry. Co., 194 Va. at 511, 74 S.E.2d at 280.* A very slight advantage to the one party or a trifling inconvenience to the other is generally held sufficient to support the promise. *Brewer, 202 Va. at 815, 120 S.E.2d at 279.*

Forbearance to prosecute a well-founded or doubtful claim, as opposed to an invalid, worthless, or unfounded claim, is sufficient consideration for a contract. *Hamm, 258 Va. at 38, 515 S.E.2d at 774.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.050
## Specified Time for Acceptance

**A person making an offer may specify a period of time within which it must be accepted. When this time period expires, the offer expires. An acceptance made after this time does not result in a contract.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 8.2-206, 8.2-207 (contracts under the UCC).

**Case Authority:** *Cargo Carriers, Inc. v. Richmond Steel Co., 263 F.2d 919, 924 (4th Cir. 1959)*; *Chain v. Wilhelm, 84 F.2d 138, 141 (4th Cir. 1936), rev'd on other grounds, 300 U.S. 31, 37 (1937).*

### Practice Commentary

When an offer is made through the mail and a definite number of days is given for acceptance, the time limit generally begins to run when the offer reaches the offeree. *Caldwell v. Cline, 109 W. Va. 553, 555–56, 156 S.E. 55, 55–56 (1930).* The notion that an offer is "effective upon receipt" applies generally to an offer made any way where receipt is not instantaneous. The rule has been criticized because it gives the offeree the benefit of any uncertainty or difficulties in delivery which defeats the offeror's purpose in designating a definite time limit on the offer. Note, *Contracts—Offer By Mail—Determination of Time Limit for Acceptance*, 17 Va. L. Rev. 503 (1931). The offeror can guard against the adverse effects of delay, however, by specifying a certain date, rather than a certain number of days, for acceptance.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice, Chapter 24

Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure § 2.3

Kent Sinclair, Virginia Remedies, Chapters 36, 38, 40

Michie's Jurisprudence, Contracts §§ 1 through 140

## Instruction No. 45.060
## No Time Specified for Acceptance

**When an offer does not specify any definite time for acceptance, it expires after a reasonable time. An acceptance made after this time does not result in a contract.**

**You must decide what a reasonable time is by considering the purpose and terms of the proposed contract, business customs, and other surrounding circumstances of which the party to whom the offer was made knows or has reason to know.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-206, 8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Martin v. Basham, 216 Va. 914, 916, 223 S.E.2d 899, 900–01 (1976)*; *Crews v. Sullivan, 133 Va. 478, 483–84, 113 S.E. 865, 867 (1922).*

### PRACTICE COMMENTARY

When an offer is made without any limits on the time for acceptance, it must be accepted within a reasonable time or it is presumed to be withdrawn. This is true even though the offeror has done nothing to give notice that the offer is withdrawn. *Crews, 133 Va. at 483–84, 113 S.E. at 867.* The purpose of this rule is to protect the offeror against results that he does not expect or reasonably foresee.

What is considered a reasonable time for acceptance is ordinarily a question of fact to be determined from the perspective of the offeree.

The offeror's conduct may lead an offeree to consider the offer open at a time that would otherwise be unreasonable. A. CORBIN, CORBIN ON CONTRACTS § 2.16.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.070
## Communication of Acceptance

**The acceptance of an offer must be communicated to the other party by words, conduct, or any other means which would make it clear to a reasonable person in the position of the person who made the offer that his offer is being accepted.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-206, 8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Phillips v. Mazyck, 273 Va. 630, 636, 643 S.E.2d 172, 175–76 (2007)*; *Bankers Credit Serv. of Vermont v. Dorsch, 231 Va. 273, 275, 343 S.E.2d 339, 341 (1986)*; *Dulany Foods, Inc. v. Ayers, 220 Va. 502, 509–10, 260 S.E.2d 196, 200–01 (1979)*; *Durham v. Nat'l Pool Equip. Co., 205 Va. 441, 445, 138 S.E.2d 55, 58 (1964)*; *Boone v. Standard Acc. Ins. Co., 192 Va. 672, 679, 66 S.E.2d 530, 534 (1951)*; *Morris v. Bragg, 155 Va. 912, 920–21, 156 S.E. 381, 384 (1931)*; *Green's Ex'rs v. Smith, 146 Va. 442, 453–54, 131 S.E. 846, 849 (1926)*; *Fitzhugh v. Jones, 20 Va. (6 Munf.) 83, 86 (1818).*

### PRACTICE COMMENTARY

The modern test of acceptance is whether it would be clear to a reasonable man in the position of the offeror that there was an acceptance. See *Green's Ex'rs, 146 Va. at 452–53, 131 S.E. at 848.* Acceptance may be communicated in express words, or it may be inferred from the acts and conduct of the parties. *Bankers Credit Serv., 231 Va. at 275, 343 S.E.2d at 341*; *Dulany Foods, Inc., 220 Va. at 509–10, 260 S.E.2d at 200–01.* Acceptance may also be effected by doing what is requested, but a contract arises only when the accepting party completes the performance required by the offer to evidence acceptance. At no point before sufficient performance evidencing acceptance is he bound further nor does he have any contractual rights. *Morris, 155 Va. at 920–21, 156 S.E. at 384.*

A party's silence is insufficient to show its intention to be bound by the terms of a contract. *Phillips, 273 Va. at 638, 643 S.E.2d at 176.*

In the absence of circumstances from which an acceptance may be implied, an acceptance will not be presumed from a mere failure to decline a proposal. *Boone, 192 Va. at 680, 66 S.E.2d at 535.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.080
## Acceptance Must Match Offer

**An offer may specify the time, place or method of acceptance. The acceptance must comply with the offer in every material respect. If the acceptance is not identical to the offer in all material respects, or if a new material term is added, there is no contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-206, 8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Chang v. First Colonial Sav. Bank, 242 Va. 388, 393, 410 S.E.2d 928, 931 (1991)*; *Virginia Hardwood Lumber Co. v. Hughes, 140 Va. 249, 257–58, 124 S.E. 283, 285 (1924)*; *Gibney & Co. v. Arlington Brewery Co., 112 Va. 117, 121, 70 S.E. 485, 487 (1911).*

### PRACTICE COMMENTARY

For a case involving offer and counteroffer in the purchase order context, see *J.B. Moore Elec. Contractor, Inc. v. Westinghouse Elec. Supply Co., 221 Va. 745, 750, 273 S.E.2d 553, 556–57 (1981).*

When a contract is completed in form, that is, it has been signed but the contract specifies that it will not become operative until some act is performed or some event occurs, that act or event is a condition precedent. There may be an issue for the jury whether a contract contains a condition precedent, although that is usually for the court, or there may be an issue for the jury whether the act or event has occurred. *R.G. Pope Constr. Co. v. Guard Rail, 219 Va. 111, 118–19, 244 S.E.2d 774, 778 (1978)*; *Barcroft Woods, Inc. v. Francis, 201 Va. 405, 409–10, 111 S.E.2d 512, 516–17 (1959)*; *Wright v. Agelasto, 104 Va. 159, 161, 51 S.E. 191, 191–92 (1905)*; *Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 364–65, 26 S.E. 850, 851–52 (1897)*; *Wendlinger v. Smith, 75 Va. 309, 314–16 (1881).* A party's signature may be a condition precedent to a written contract. *Dixon v. Hassell & Folkes, P.C., 283 Va. 456, 460–61, 723 S.E.2d 383, 385, (2012).*

☞ ***PRACTICE POINTER:*** See Instruction No. 45.090 on the cognate topic of a Meeting of the Minds.

The common law rule of exact correspondence has proved a hindrance to the conclusion of business contracts because of the prevailing use of printed forms which differ, sometimes only slightly, in their terms. The Uniform Commercial Code has responded to this difficulty in Va. Code Ann. § 8.2-207 (additional terms in acceptance or confirmation).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.090
## Meeting of the Minds

**For a contract to exist, the minds of the parties must have met on every material term of the alleged agreement.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Phillips v. Mazyck, 273 Va. 630, 635–36, 643 S.E.2d 172, 175–76 (2007)*; *Brooks & Co. Gen. Contrs., Inc. v. Randy Robinson Contr. Inc., 257 Va. 240, 245, 513 S.E.2d 858, 860 (1999)*; *Marefield Meadows, Inc. v. Lorenz, 245 Va. 255, 260, 427 S.E.2d 363, 365 (1993)*; *Wells v. Weston, 229 Va. 72, 78–79, 326 S.E.2d 672, 676 (1985)*; *Smith v. Farrell, 199 Va. 121, 128, 98 S.E.2d 3, 7 (1957)*; *Lucy v. Zehmer, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954)*; *Agostini v. Consolvo, 154 Va. 203, 212–13, 153 S.E. 676, 679 (1930)*; *Green's Ex'rs v. Smith, 146 Va. 442, 452, 131 S.E. 846, 848 (1926).*

## PRACTICE COMMENTARY

This instruction is only appropriate where ambiguity about the terms creates a jury issue on whether the parties actually did agree on all of the terms.

The parties must agree to the same thing at the same time, and the assent must be to the precise terms offered. *Smith, 199 Va. at 128, 98 S.E.2d at 7.*

Whether the minds of the parties have met is a question of intent. For there to be an agreement, the parties must have a distinct intent common to both and without doubt or difference. Because the offer and acceptance may be by word, act, or conduct, a meeting of the minds may be shown by direct evidence of intent or by indirect evidence of facts that imply an intent. The law imputes to a person an intent corresponding to the reasonable meaning of his words and acts. If a person's words or actions warrant a reasonable person in believing that he intended real agreement, his contrary, but unexpressed, state of mind is immaterial. *Phillips, 273 Va. at 636, 643 S.E.2d at 175–76*; *Wells, 229 Va. at 78–79, 326 S.E.2d at 676.*

"The essential terms to a contract for sale of real estate include 'the names of the parties, the terms and conditions of the contract, and a description of the property sufficient to render it capable of identification' (citation omitted). Perhaps most importantly, 'mutuality of assent—the meeting of the minds of the parties—is an essential element of all contracts. Until the parties have a distinct intention common to both . . . there is a lack of mutual assent and, therefore, no contract' (citation omitted). Mutual assent is determined 'exclusively from those expressions of [the parties'] intentions which are *communicated* between them' " (citation omitted). *Moorman v. Blackstock, Inc., 276 Va. 64, 75, 661 S.E.2d 404, 409 (2008)* (emphasis in the original).

Whether an agreement to arbitrate is valid is governed by traditional principles of contract law. *Phillips, 273 Va. at 635, 643 S.E.2d at 175.* Where there is no evidence that the party seeking enforcement of a purported contract to arbitrate objectively manifested its intention to be bound by it, the contract lacks the mutual assent of the parties and is unenforceable. *Id. at 636–38, 643 S.E.2d at 176–77.*

If the parties agree fully and intend to be bound, a contract exists though a formal writing is to be prepared and signed. If they agree fully but do not intend to bind themselves until a formal contract is prepared, there is no contract. *Golding*

*v. Floyd, 261 Va. 190, 193–94, 539 S.E.2d 735, 737–38 (2001); Agostini, 154 Va. at 212–13, 153 S.E. at 679.*

☞ ***PRACTICE POINTER:*** A contract by correspondence must evince a clear accession by both parties to the same set of terms. *Bloomberg-Michael Furniture Co. v. Coppes Bros. & Zook, 141 Va. 18, 31–32, 126 S.E. 59, 63 (1925).*

Where the material facts concerning the formation of an alleged contract are not in dispute, the issue of contract *vel non* is a question of law. *Valjar, Inc. v. Maritime Terminals, Inc., 220 Va. 1015, 1018, 265 S.E.2d 734, 736 (1980).*

### ***ALERTS:***

None.

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.100
## Counteroffer

**A proposal to accept an offer on terms which are different from the ones offered is both a rejection of the original offer and a counteroffer. A counteroffer is a new offer.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Chittum v. Potter, 216 Va. 463, 468, 219 S.E.2d 859, 864 (1975)*; *Wards Co. v. Lewis & Dobrow, Inc., 210 Va. 751, 756, 173 S.E.2d 861, 865 (1970)*; *Rotella v. Lange, 202 Va. 575, 578, 118 S.E.2d 516, 519 (1961)*; *Measell v. Baruch, 152 Va. 460, 466, 147 S.E. 203, 204 (1929)*; *Crews v. Sullivan, 133 Va. 478, 483, 113 S.E. 865, 867 (1922).*

### PRACTICE COMMENTARY

A proposal to accept on terms which vary from those offered is a rejection of the offer and puts an end to negotiations as far as the original offer is concerned. Once an offer has been rejected, even by proffering an acceptance with conditional or varying terms, a subsequent acceptance of the original offer cannot create a contract. *Rotella, 202 Va. at 578, 118 S.E.2d at 519.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.110
## Withdrawing an Offer

**An offer may be withdrawn at any time before it is accepted. The withdrawal must be communicated to the other party before the offer is accepted. The withdrawal may be made in any way which communicates to a reasonable person that the person who made the offer no longer wants to enter into a contract. After the offer is withdrawn, an attempt at acceptance does not result in a contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-205 to 8.2-207 (contracts under the UCC).

**CASE AUTHORITY:** *Chang v. First Colonial Sav. Bank, 242 Va. 388, 392, 410 S.E.2d 928, 931 (1991)*; *Humble Oil & Ref. Co. v. Cox, 207 Va. 197, 202, 148 S.E.2d 756, 760–61 (1966)*; *J.B. Colt Co. v. Elam, 138 Va. 124, 129, 120 S.E. 857, 858 (1924)*; *Crews v. Sullivan, 133 Va. 478, 483, 113 S.E. 865, 867 (1922)*; *Carter v. Hook, 116 Va. 812, 818, 83 S.E. 386, 388 (1914)*; *Cady v. Straus, 97 Va. 701, 707, 34 S.E. 615, 617 (1899).*

### PRACTICE COMMENTARY

If the offeree has given consideration to have the offer remain open, then it cannot be withdrawn before the specified time. *Carter, 116 Va. at 818, 83 S.E.2d at 388.*

A withdrawal sent through the mail is effective only when received. *J.B. Colt Co., 138 Va. at 129, 120 S.E. at 858.* This rule prevents a retraction after the offeree has posted his acceptance. It is also well settled that death or insanity of the offeror automatically terminates the offer. *Chain v. Wilhelm, 84 F.2d 138, 140 (4th Cir. 1936), rev'd on other grounds by United States ex rel. Wilhelm v. Chain, 300 U.S. 31, 37 (1937).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.120
## Adequacy of Consideration

**Consideration for a** [promise; act] **does not need to be equal in value to the** [promise; act]**. The only requirement is that consideration be of some value, however slight.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Payne v. Simmons, 232 Va. 379, 384, 350 S.E.2d 637, 640 (1986)*; *Horace Mann Ins. Co. v. Gov't Emps. Ins. Co., 231 Va. 426, 429–30, 344 S.E.2d 906, 908 (1986)*; *Dulany Foods, Inc. v. Ayers, 220 Va. 502, 511, 260 S.E.2d 196, 202 (1979)*; *Looney v. Belcher, 169 Va. 160, 167–68, 192 S.E. 891, 893–94 (1937)*; *Maughs v. Porter, 157 Va. 415, 419–20, 161 S.E. 242, 243 (1931)*; *Good v. Dyer, 137 Va. 114, 135, 119 S.E. 277, 282 (1923)*; *Richmond Eng'g & Mfg. Corp. v. Loth, 135 Va. 110, 155, 115 S.E. 774, 787 (1923)*; *Long v. Harrison, 134 Va. 424, 441–42, 114 S.E. 656, 661–62 (1922).*

### PRACTICE COMMENTARY

As long as the consideration is of any value, a court will not inquire further into the adequacy. The extent to which the promisor is benefited or how little the promisee may give for the promise is of no concern; slight advantage to one party or trifling inconvenience to the other is sufficient. *Dulany Foods, 220 Va. at 511, 260 S.E.2d at 202.* Continuance of employment in a plant about to close was held sufficient. *Id. at 512, 260 S.E.2d at 202.*

Anything that may be detrimental to the promisee or beneficial to the promisor will constitute good consideration for a promise. Even the possibility of a loss to the promisee is sufficient, though no benefit actually accrues to the promisor. To be consideration, the detriment must be a detriment upon entering the contract and not a detriment that arises from breach of a contract. *Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 584, 194 S.E. 727, 731 (1938).*

Inadequacy of consideration alone is not enough to rescind a contract, but inadequacy of consideration in connection with other circumstances may be evidence of fraud or undue influence. *Payne, 232 Va. at 384, 350 S.E.2d at 640*; *Long v. Harrison, 134 Va. 424, 441–42, 114 S.E. 656, 661–62 (1935).* See Instruction No. 45.460, Undue Influence; Instruction No. 45.470, Duress; and Chapter 39, Fraud. See also Instruction No. 45.130, Performing Prior Legal Duty Not Consideration.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.130**
**Performing Prior Legal Duty Not Consideration**

[Doing; promising to do] **what one is already obligated to do is not consideration.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Seward v. New York Life Ins. Co., 154 Va. 154, 168, 152 S.E. 346, 350 (1930)*; *Smith v. Chilton, 84 Va. 840, 842, 6 S.E. 142, 143 (1888)*; *Smith v. Phillips, 77 Va. 548, 550–51 (1883)*; *Keffer v. Grayson, 76 Va. 517, 520 (1882).*

### PRACTICE COMMENTARY

Exceptions exist to the rule that performing an existing obligation is not a sufficient consideration for a new promise: e.g., when the original contract is abandoned or rescinded and a new contract is substituted, *Seward, 154 Va. at 168, 152 S.E. at 350*; when a new element, such as a promise to pay at an earlier date, or at a different place, or through a different agent, is offered as consideration for a new agreement to take a part for the whole previously promised. *Seymour v. Goodrich, 80 Va. 303, 304–05 (1885).* A new promise to pay is a valid consideration to revive a debt barred by the statute of limitations. *Keffer, 76 Va. at 520.* A new written promise of payment of money on a contract may extend the statute of limitations applicable to the original contract, or create a new cause of action based in the written promise. Va. Code Ann. § 8.01-229(G).

### *ALERTS:*

- See Instruction No. 44.010, Accord and Satisfaction—Uniform Commercial Code.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.140
## Past Act Not Consideration

**An act done in the past cannot be consideration for a later contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Sager v. Basham, 241 Va. 227, 230, 401 S.E.2d 676, 677 (1991)*; *Davis v. Anderson, 99 Va. 620, 623–24, 39 S.E. 588, 589–90 (1901)*; *Stoneburner & Richards v. Motley, 95 Va. 784, 788, 30 S.E. 364, 365 (1898)*; *Keffer v. Grayson, 76 Va. 517, 520 (1882).*

### PRACTICE COMMENTARY

A moral obligation cannot be consideration unless it once was consideration, but is no longer binding because of some rule of law, or has ceased to be binding because of some supervening cause. A debt discharged by bankruptcy is an example of a moral obligation which can serve as consideration. A debt barred from recovery by a statute of limitations or by bankruptcy or insolvency laws may be revived by a new promise to pay. *Keffer, 76 Va. at 520.* The new promise will constitute a valid consideration. *Id.* The consideration needed to support the new promise is either moral obligation to pay, *Dillard v. Collins, 66 Va. 343, 1874 Va. LEXIS 63, at *51–52 (1874)* (citing *Horner v. Speed, 2 Pat. & H. 616, 1857 Va. Lexis 54 (1857)*), or the original consideration.

In other situations, the courts require a strong case before they will hold a moral obligation binding on a person. A later promise to pay for services which were rendered is without consideration when there is neither an express contract nor a contract implied in law. *Stoneburner, 95 Va. at 788, 30 S.E. at 365.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.150
## Not Suing as Consideration

**If a person has a claim against another, his promise not to sue is consideration for a contract if the claim has some reasonable basis.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hamm v. Scott, 258 Va. 35, 38, 515 S.E.2d 773, 774 (1999)*; *Greenwood Assocs., Inc. v. Crestar Bank, 248 Va. 265, 268–69, 448 S.E.2d 399, 402 (1994)*; *Veilleux v. Merrill Lynch Relocation Mgmt., Inc., 226 Va. 440, 444, 309 S.E.2d 595, 598 (1983)*; *Cushman v. Fitz-Hugh, 199 Va. 234, 241, 98 S.E.2d 706, 710 (1957)*; *Hooff v. Paine, 172 Va. 481, 485, 2 S.E.2d 313, 314 (1939)*; *Saunders v. Bank of Mecklenburg, 112 Va. 443, 453–54, 71 S.E. 714, 717 (1911)*; *Colgin v. Henley, 33 Va. (6 Leigh) 85, 97–98 (1835).*

### PRACTICE COMMENTARY

"Mere forbearance, without an agreement to that effect, is not sufficient consideration for a promise, even though the fact of forbearance was induced by the promise." *Greenwood Assocs., Inc., 248 Va. at 269, 448 S.E.2d at 402.*

"An agreement to forebear does not require a writing, but may be implied from the parties' conduct and the nature of the transaction." *Hamm, 258 Va. at 38, 515 S.E.2d at 774.*

See generally Chapter 44, Compromise and Settlement.

### *ALERTS:*

- In an action for breach of a covenant not to sue, attorney's fees may be recoverable without a specific contractual or statutory provision allowing for such damages. *Bolton v. McKinney, 299 Va. 550, 556–57, 855 S.E.2d 853, 857 (2021).*

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.160
## Competence of Parties to Contract

**The parties to a contract must be competent. A person is competent if he is capable of understanding the nature and the effect of the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Ayers v. Mosby, 256 Va. 228, 234, 504 S.E.2d 845, 848 (1998)*; *First Va. Bank-Colonial v. Masri, 245 Va. 461, 463–64, 428 S.E.2d 903, 904 (1993)*; *Upton v. Hall, 225 Va. 168, 173, 300 S.E.2d 777, 779 (1983)*; *Lohman v. Sherwood, 181 Va. 594, 606–07, 26 S.E.2d 74, 79–80 (1943)*; *Price's Ex'r v. Barham, 147 Va. 478, 482, 137 S.E. 511, 512 (1927)*; *Adams v. Hazen, 123 Va. 304, 319, 96 S.E. 741, 745 (1918)*; *Chesapeake & Ohio R.R. Co. v. Mosby, 93 Va. 93, 94–95, 24 S.E. 916, 916–17 (1896).*

### PRACTICE COMMENTARY

It is assumed that every adult person is capable of contracting. The lack of competence must be proved by the party who claims incapacity. *Chesapeake & Ohio Ry. Co., 93 Va. at 94, 24 S.E. at 916.*

"In the absence of fraud, duress, or mutual mistake, an individual having the capacity to understand a written document, who signs that document without reading it, is bound by his signature." *First Va. Bank-Colonial, 245 Va. at 463, 428 S.E.2d at 904.*

A party's intoxication cannot void a contract unless he was so intoxicated that he could not understand the nature of the business which he transacted. *Lucy v. Zehmer, 196 Va. 493, 500, 84 S.E.2d 516, 520 (1954).*

A contract made by a person who is mentally incompetent is voidable. Whether the counterparty has acted in good faith affects the remedy. *Upton, 225 Va. at 173, 300 S.E.2d at 779.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.170
## Contract Must Be Complete and Reasonably Certain

**A contract must be both complete and reasonably certain. It is complete if it includes all the essential terms. It is reasonably certain if all the essential terms are expressed in a clear and definite way.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.2-201.

**Case Authority:** *Dean v. Morris, 287 Va. 531, 537–38, 756 S.E.2d 430, 433–34 (2014)*; *Burton Lumber Corp. v. Aughenbaugh, 223 Va. 491, 497, 290 S.E.2d 853, 855–56 (1982)*; *Allen v. Aetna Cas. & Sur. Co., 222 Va. 361, 364, 281 S.E.2d 818, 820 (1981)*; *Progressive Constr. Co. & Thumm, 209 Va. 24, 30–31, 161 S.E.2d 687, 691 (1968)*; *High Knob, Inc. v. Allen, 205 Va. 503, 507, 138 S.E.2d 49, 53 (1964)*; *Smith v. Farrell, 199 Va. 121, 127–28, 98 S.E.2d 3, 7 (1957)*; *Mullins v. Mingo Lime & Lumber Co., 176 Va. 44, 50, 10 S.E.2d 492, 494 (1940)*; *Manss-Owens Co. v. H.S. Owens & Son, 129 Va. 183, 197, 105 S.E. 543, 547 (1921)*; *Adams v. Hazen, 123 Va. 304, 319–20, 96 S.E. 741, 745 (1918).*

## Practice Commentary

Although time is usually considered a material term, failure to specify the length of time for performance does not render the contract incomplete if the intent of the parties is otherwise ascertainable. *High Knob, Inc., 205 Va. at 508–09, 138 S.E.2d at 53.*

Where a party seeks specific performance of a contract, the standard of certainty is apparently higher than when a party seeks damages. In the first case, the contract must be certain in all particulars essential to the enforcement of the contract; in the latter case, certainty needs only be shown as to the general scope and stipulations of the contract. *Manss-Owens Co., 129 Va. at 196, 105 S.E. at 547.* A party is entitled to specific performance of a contract when the agreement of the parties so provides, or when the property contracted for is unique and the party seeking specific performance has no adequate remedy at law. *Hamlet v. Hayes, 273 Va. 437, 443, 641 S.E.2d 115, 118 (2007).*

When an entire agreement is only partially reduced to writing, parol evidence may show additional independent facts contemporaneously agreed upon in order to establish the entire contract. *Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner, 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983).* Parol evidence is not admissible in the interpretation of an unambiguous written contract. *Virginia Elec. & Power Co. v. N. Virginia Reg'l Park Auth., 270 Va. 309, 316, 618 S.E.2d 323, 326–27 (2005).* While mutual mistake of fact may be clarified by parol evidence, parol evidence may not be introduced to vary a written contract because of unilateral mistakes as to its content. *Fox-Sadler Co. v. Earl E. Norris Roofing Co., 229 Va. 106, 110, 327 S.E.2d 95, 97 (1985).*

The use of the phrase "fair market value" may be too uncertain to compel specific performance of a contract involving the purchase of real estate. *Wilburn v. Mangano, 299 Va. 348, 355–56, 851 S.E.2d 474, 478 (2020).*

## *ALERTS:*

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.180
## Mutuality of Obligation

**When two parties have exchanged promises as consideration, each party must be bound to** [do; refrain from doing] **something.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Miller v. SEVAMP, Inc., 234 Va. 462, 465, 362 S.E.2d 915, 917 (1987)*; *Capps v. Capps, 216 Va. 378, 381, 219 S.E.2d 901, 903 (1975)*; *Town of Vinton v. City of Roanoke, 195 Va. 881, 896, 80 S.E.2d 608, 617 (1954)*; *Twohy v. Harris, 194 Va. 69, 81, 72 S.E.2d 329, 336 (1952)*; *C. G. Blake Co. v. W.R. Smith & Son, 147 Va. 960, 971–72, 133 S.E. 685, 688 (1926)*; *American Agric. Chem. Co. v. Kennedy, 103 Va. 171, 176, 48 S.E. 868, 870 (1904).*

### PRACTICE COMMENTARY

Mutuality of obligation is essential to constitute an enforceable contract. *Bott v. Wheeler, 183 Va. 643, 647–48, 33 S.E.2d 184, 185–86 (1945).*

In an agreement between a buyer and a seller, if one party reserves a right to cancel at any time, he has not obligated himself or imposed any liability upon himself if he terminates the agreement. Therefore, the contract is void for want of mutuality. *American Agric. Chem. Co., 103 Va. at 178, 48 S.E. at 871.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.190
## Intent

**Interpretation of a contract is primarily a determination of what the parties intended. In determining their intent, you should first consider the words they used.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *CNX Gas Co. v. Rasnake, 287 Va. 163, 166–67, 752 S.E.2d 865, 867 (2014)*; *Schuiling v. Harris, 286 Va. 187, 192–93, 747 S.E.2d 833, 836 (2013)*; *Heron v. Transp. Cas. Ins. Co., 274 Va. 534, 539, 650 S.E.2d 699, 702 (2007)*; *Video Zone, Inc. v. KF&F Props., L.C., 267 Va. 621, 626, 594 S.E.2d 921, 923–24 (2004)*; *Musselman v. The Glass Works, L.L.C., 260 Va. 342, 346, 533 S.E.2d 919, 921 (2000)*; *Westmoreland-LG&E Partners v. Virginia Elec. & Power Co., 254 Va. 1, 10–11, 486 S.E.2d 289, 294 (1997)*; *Tuomala v. Regent Univ., 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996)*; *Brooks v. Bankson, 248 Va. 197, 203–04, 445 S.E.2d 473, 476–77 (1994)*; *Clevert v. Jeff W. Soden, Inc., 241 Va. 108, 110–11, 400 S.E.2d 181, 183 (1991)*; *High Knob, Inc. v. Allen, 205 Va. 503, 508, 138 S.E.2d 49, 53 (1964)*; *Ames v. American Nat'l Bank, 163 Va. 1, 38, 176 S.E. 204, 216 (1934)*.

### PRACTICE COMMENTARY

Ordinarily, the construction of a written contract is a matter for the court alone. *Am. Ins. Co. v. Damascus Lumber Co., 139 Va. 380, 385, 124 S.E. 269, 270 (1924)*. If the terms of the contract are clear and unambiguous, the court alone must construe the contract. In such a case, it is improper to submit the contract to the jury for interpretation. *Winn v. Aleda Constr. Co., 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984)*. Where a contract is not clear and unambiguous, but is made clear by properly admitted extrinsic evidence, it remains the duty of the court rather than the jury to construe it. *Geoghegan Sons & Co. v. Arbuckle Bros., 139 Va. 92, 100–01, 123 S.E. 387, 389 (1924)*.

Where a contract is not clear and unambiguous so that extrinsic evidence becomes admissible, and where different conclusions might be drawn from the extrinsic evidence, construction of the contract is for the jury. *Combs v. Dickenson-Wise Medical Group, 233 Va. 177, 184, 355 S.E.2d 553, 557 (1987)*.

For a case where the parties disagreed over the interpretation of an arbitration clause and whether the doctrine of impossibility applied to that clause, see *Brush Harbor Home Construction, LLC v. Alexander, 297 Va. 151, 823 S.E.2d 249 (2019)*.

The burden of proving a meaning other than the plain and obvious one falls on the party alleging a different meaning. *Ames, 163 Va. at 39, 176 S.E. at 217*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.200
## Express Contract

**An express contract is an agreement, either written or oral, in which the terms are stated by the parties.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Spectra-4, LLP v. Uniwest Commercial Realty, Inc., 290 Va. 36, 43, 772 S.E.2d 290, 293 (2015)*; *Hendrickson v. Meredith, 161 Va. 193, 200, 170 S.E. 602, 605 (1933)*; *City of Norfolk v. Norfolk County, 120 Va. 356, 362, 91 S.E. 820, 821–22 (1917).*

### PRACTICE COMMENTARY

Both express and implied contracts have the same legal effect. The distinction lies in the way mutual assent is manifested.

To establish an oral contract of insurance, plaintiff must prove by clear and convincing evidence each of the following: (1) the names of the parties to the contract, (2) the subject of the insurance, (3) the risk insured against, (4) the time at which the insurance takes effect and the length of time it is to continue, (5) a statement of the premium, and (6) the conditions pertaining to the insurance. *Yates v. Whitten Valley Rental Corp., 226 Va. 436, 437–38, 309 S.E.2d 330, 331 (1983); Dickerson v. Conklin, 218 Va. 59, 65–67, 235 S.E.2d 450, 454–55 (1977).* See Instruction No. 47.090, Essential Elements of Insurance Contract; Va. Code Ann. § 38.2-305.

"The essential terms to a contract for the sale of real estate include the names of the parties, the terms and conditions of the contract, and a description of the property sufficient to render it capable of identification. Perhaps most importantly, mutuality of assent—the meeting of the minds of the parties—is an essential element of all contracts. Until the parties have a distinct intention common to both . . . there is a lack of mutual assent and, therefore, no contract. Mutual assent is determined exclusively from those expressions of the parties' intentions which are *communicated* between them." *Moorman v. Blackstock, 276 Va. 64, 75, 661 S.E.2d 404, 409 (2008)* (internal quotations and citations omitted).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.210
## Implied Contract

**A contract may be implied from the circumstances and the conduct of the parties.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.2-316.

**CASE AUTHORITY:** *Spectra-4, LLP v. Uniwest Commercial Realty, Inc., 290 Va. 36, 45, 772 S.E.2d 290, 295 (2015)*; *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 407, 404 S.E.2d 216, 218 (1991)*; *American-Lafrance & Foamite Industries, Inc. v. Arlington County, 169 Va. 1, 11, 192 S.E. 758, 762 (1937)*; *Hendrickson v. Meredith, 161 Va. 193, 200, 170 S.E. 602, 605 (1933)*; *Campbell County v. Howard, 133 Va. 19, 54–57, 112 S.E. 876, 886–87 (1922)*; *Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 501–02, 96 S.E. 754, 760 (1918).*

### PRACTICE COMMENTARY

When an express contract between the parties is in existence, is enforceable, and covers the same subject matter as the alleged implied contract, there can be no implied contract. *Ellis & Meyers Lumber Co., 123 Va. at 501–02, 96 S.E. at 760.* For example, a person cannot escape the obligations of an existing express contract by claiming that an implied contract with different obligations exists between the parties. *Campbell County, 133 Va. at 54, 112 S.E. at 886.*

A contract implied by law differs from a contract implied in fact in that it does not depend on the intention of the parties to mutually agree and to promise to be bound to the implied terms. *Marine Dev. Corp. v. Rodak, 225 Va. 137, 142, 300 S.E.2d 763, 766 (1983).*

When an implied in fact contract exists, the parties' conduct must establish the terms of the contract. *Spectra-4, LLP, 290 Va. at 45, 772 S.E.2d at 295.*

Implied by law contracts, or quasi-contractual obligations, rest on notions of fundamental fairness and justice. *American-LaFrance & Foamite Indus., 169 Va. at 10–11, 192 S.E. at 762.* For example, where one party has received a benefit from another person in the form of services or goods and at the expense of that person, the law will imply a contract to pay for the goods or services. *Ricks v. Sumler, 179 Va. 571, 577–78, 19 S.E.2d 889, 891–92 (1942).*

The general rule that an implied legal obligation arises from the rendering of services does not apply in the case of close family members. Instead, the assumption is that services rendered among members of a family are gratuitous. *Jackson v. Jackson, 96 Va. 165, 170, 31 S.E. 78, 80 (1898).*

☞ ***PRACTICE POINTER:*** For a case discussing how to draft an instruction on contract implied by law, see *Marine Dev. Corp., 225 Va. at 142–44, 300 S.E.2d at 766–67.*

### *ALERTS:*

- It would be error to instruct on a theory of breach of implied warranty when that theory is not raised by the pleadings. *Ted Lansing Supply Co. v. Royal Alum. & Constr. Corp., 221 Va. 1139, 1141–42, 277 S.E.2d 228, 229–30 (1981).*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.230
## Implied Promise to Pay for Services

**When a party requests another person to perform services, the law implies a promise to pay the reasonable value of those services in the absence of agreement as to price.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Mongold v. Woods, 278 Va. 196, 203, 677 S.E.2d 288, 292 (2009)*; *Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 114–15, 495 S.E.2d 478, 482 (1998)*; *Cochran v. Bise, 197 Va. 483, 487–88, 90 S.E.2d 178, 182 (1955)*; *Burke v. Gale, 193 Va. 130, 134–35, 67 S.E.2d 917, 919 (1951)*; *Haynes Chem. Corp. v. Staples & Staples, Inc., 133 Va. 82, 88–89, 112 S.E. 802, 804 (1922).*

### PRACTICE COMMENTARY

When one person renders services for another who knows of them and accepts them, the law implies a promise to pay a reasonable compensation for the services. *Burke, 193 Va. at 134–35, 67 S.E.2d at 919.*

A person who renders services under a contract which is void because of the Statute of Frauds or some other reason may recover the reasonable value of the services rendered. *Cochran, 197 Va. at 487–88, 90 S.E.2d at 182.*

### *ALERTS:*

- If the service is given voluntarily and gratuitously, the law will not imply a promise to pay. The law also will not imply a promise to pay only on evidence of the receipt of a benefit. Additional facts to support an implied promise to pay must be shown. *Mullins v. Mingo Lime & Lumber Co., 176 Va. 44, 50–51, 10 S.E.2d 492, 494–95 (1940).*

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.300**
**Contract Construed as a Whole**

**The contract should be considered as a whole; no part of it should be ignored. The contract should be interpreted to give effect to each of its provisions. No word or phrase in a contract should be treated as meaningless if any meaning which is reasonable and consistent with other parts of the contract can be given to it.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *CNX Gas Co. v. Rasnake, 287 Va. 163, 168, 752 S.E.2d 865, 867 (2014)*; *Schuiling v. Harris, 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013)*; *Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010)*; *First American Bank v. J.S.C. Concrete Constr., 259 Va. 60, 69, 523 S.E.2d 496, 501 (2000)*; *Vega v. Chattan Assocs., 246 Va. 196, 199, 435 S.E.2d 142, 143 (1993)*; *Berry v. Klinger, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)*; *J.M. Turner & Co. v. Delaney, 211 Va. 168, 172, 176 S.E.2d 422, 425 (1970)*; *Hutchison v. King, 206 Va. 619, 624–25, 145 S.E.2d 216, 220 (1965)*; *Southwest Virginia Hosps., Inc. v. Lipps, 193 Va. 191, 205, 68 S.E.2d 82, 90 (1951)*; *Bott v. N. Snellenburg & Co., 177 Va. 331, 338, 14 S.E.2d 372, 374 (1941)*; *Tate v. Tate, 75 Va. 522, 527–28 (1881).*

## Practice Commentary

All interpretations of the contract must be reasonable. The reasonableness of any interpretation should be determined from the intent of the parties, the nature and condition of the subject matter of the contract, the situation of the parties, and the purposes they had in mind when making the contract. But any interpretation must also be consistent with the terms of the written contract itself. The interpretation which is most just is favored. *American Realty Trust v. Chase Manhattan Bank, 222 Va. 392, 403, 281 S.E.2d 825, 831 (1981)*; *High Knob, Inc. v. Allen, 205 Va. 503, 508, 138 S.E.2d 49, 53 (1964)*; *Seward v. American Hardware Co., 161 Va. 610, 625–26, 171 S.E. 650, 659 (1933)*; *White v. Sayers, 101 Va. 821, 826, 45 S.E. 747, 749 (1903).*

The contract should be interpreted to render it valid and capable of performance. *Walker & Laberge Co. v. First Nat'l Bank, 206 Va. 683, 691, 146 S.E.2d 239, 245 (1966)*; *Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 583, 194 S.E. 727, 730 (1938)*; *Hunter v. Hollingsworth, 165 Va. 583, 590, 183 S.E. 508, 511 (1936)*; *Merriman v. Cover, Drayton & Leonard, 104 Va. 428, 435, 51 S.E. 817, 818 (1905).*

Where two or more contracts or writings are so connected as to be parts of the same transaction, each may be used to interpret the other. *Countryside Orthopaedics, P.C. v. Peyton, 261 Va. 142, 151–52, 541 S.E.2d 279, 284 (2001).* And, where multiple documents together form the written contract, the meaning of the contract must be gathered from all of these associated parts as the unitary expression of the parties' agreement. *Parr v. Alderwoods Grp., Inc., 268 Va. 461, 467, 604 S.E.2d 431, 434–35 (2004)*; *Countryside Orthopaedics, 261 Va. at 151–52, 541 S.E.2d at 284*; *First American Bank, 259 Va. at 67, 523 S.E.2d at 500*; *Daugherty v. Diment, 238 Va. 520, 524–25, 385 S.E.2d 572, 574 (1989)*; *First American Title Ins. Co. v. Seaboard Sav. & Loan Ass'n, 227 Va. 379, 384, 315 S.E.2d 842, 845 (1984).*

Where the contract is clear and unambiguous, its meaning is a question of law. A question of fact for resolution by the jury is raised only where the contract's terms are ambiguous. *Winn v. Aleda Constr. Co., 227 Va. 304, 307, 315 S.E.2d 193,*

*194 (1984).* Ambiguity is defined as "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." *Fried v. Smith, 244 Va. 355, 357, 421 S.E.2d 437, 438 (1992).* Whether a contract is ambiguous or not is a question of law. *Video Zone, Inc. v. KF&F Properties, L.C., 267 Va. 621, 625, 594 S.E.2d 921, 923 (2004); Musselman v. Glass Works, L.L.C., 260 Va. 342, 346, 533 S.E.2d 919, 921 (2000); Wilson v. Holyfield, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984).*

See also Instruction No. 45.190, Intent.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.305**
**Ordinary Meaning of Words**

**Words used by the parties should be given their ordinary, usual, and popular meaning, unless you find that the parties clearly intended such words to have another meaning.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *RECP IV WG Land Investors v. Capital One, 295 Va. 268, 283, 811 S.E.2d 817, 825 (2018)*; *Squire v. Virginia Hous. Dev. Auth., 287 Va. 507, 516, 758 S.E.2d 55, 60 (2014)*; *Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., 276 Va. 285, 290, 662 S.E.2d 77, 81 (2008).*

### PRACTICE COMMENTARY

The burden of showing that words have been used in other than their usual and ordinary sense is always upon the party alleging it, as the parties are presumed to have used the words in their ordinary sense. *Clevert v. Soden, Inc., 241 Va. 108, 110–11, 400 S.E.2d 181, 183*; *Rosenberg v. Turner, 124 Va. 769, 775, 98 S.E. 763, 765 (1919).* The language employed by the parties will be interpreted in accordance with its plain meaning. *Heron v. Transp. Cas. Ins. Co., 274 Va. 534, 539, 650 S.E.2d 699, 702; Foods First, 244 Va. at 182, 418 S.E.2d at 889.*

"A basic canon of construction requires that words grouped in a list should be given related meaning." *Sainani v. Belmont Glen Homeowners Ass'n, 297 Va. 714, 831 S.E.2d 662 (2019).*

☞ ***PRACTICE POINTER:*** For a more comprehensive instruction on contract interpretation, see Instruction No. 45.190, Intent.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.310
## Construction Against the Drafter

**In interpreting a contract, you should resolve any doubts about the meaning of a word or phrase against the party who** [prepared; supplied; inserted the language in; used the language in] **the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Doctors Co. v. Women's Healthcare Assocs., 285 Va. 566, 573, 740 S.E.2d 523, 526 (2013)*; *Cappo Mgmt. V, Inc. v. Britt, 282 Va. 33, 37, 711 S.E.2d 209, 211 (2011)*; *Martin & Martin, Inc. v. Bradley Enters., 256 Va. 288, 291, 504 S.E.2d 849, 851 (1998)*; *Winn v. Aleda Constr. Co., 227 Va. 304, 307, 315 S.E.2d 193, 195 (1984).*

### PRACTICE COMMENTARY

Generally, this rule of construction, also known as the "contra proferentem" rule, is only applied where the terms of the contract are "in doubt." *Epes' Adm'r v. Hardaway, 135 Va. 80, 97, 115 S.E. 712, 718.* It is said that "[t]his rule of construction is not favored by the courts, and should not be invoked where the language of the contract is clear." *Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 529, 106 S.E. 390, 392*; see also *Charles E. Russell Co. v. Carroll, 194 Va. 699, 701–02, 74 S.E.2d 685, 687 (1953).*

Where the issue of who drafted the contract was contested, the giving of this instruction was not set aside as the instruction did not dictate to the jury who the drafter was, but rather it left that contested issue to resolution by the jury. *Online Res. Corp. v. Lawlor, 285 Va. 40, 56–57, 736 S.E.2d 886, 895–96 (2013).*

### *ALERTS:*

- This instruction should not be used if the contract was the result of negotiations so that the preparation was mutual, and the final reduction to writing did not represent the product of one party only.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.320**
**Contract Interpretation: Ejusdem Generis**

**Where general words follow particular words in a listing of items or provisions in a contract, you should interpret the general terms consistently with the particular words.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Turner v. Reed, 258 Va. 406, 410, 518 S.E.2d 832, 834 (1999)*; *W.F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc., 203 Va. 259, 263, 123 S.E.2d 377, 380 (1962)*; *Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 532, 106 S.E. 390, 393 (1921).*

### PRACTICE COMMENTARY

The rule, also known as the "ejusdem generis" rule, is used only to ascertain the intent of the parties in the language they used; it "should not be applied so as to do violence to the language of the contract." *W.F. Magann Corp., 203 Va. at 263, 123 S.E.2d at 380* (internal quotation omitted).

The Supreme Court has stated that the rule "is to be sparingly and cautiously applied, but it has a proper place in the law." *Standard Ice Co., 129 Va. at 532, 106 S.E. at 393.*

"[W]ords of particular description will control rather than general terms of description, where both cannot stand together." *Glenn v. Augusta Perpetual Bldg. & Loan Co., 99 Va. 695, 700, 40 S.E. 25, 27 (1901)* (construing a deed).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.330
## Practical Construction by the Parties

**If you have doubt about the meaning of the terms of a contract, the conduct of the parties under the contract may furnish the proper interpretation. The interpretation by the parties is entitled to great weight. However, any interpretation suggested or supported by the acts of the parties must be reasonable and not in conflict with the actual terms of the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.1A-303, 8.2-202 (contracts under the UCC).

**CASE AUTHORITY:** *Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc., 287 Va. 425, 431, 756 S.E.2d 415, 419 (2014)*; *Bentley Funding Group, L.L.C. v. SK&R Grp., L.L.C., 269 Va. 315, 332, 609 S.E.2d 49, 57–58 (2005)*; *Video Zone, Inc. v. KF&F Props., 267 Va. 621, 627, 594 S.E.2d 921, 924 (2004)*; *Federal Ins. Co. v. Starr Elec. Co., 242 Va. 459, 467, 410 S.E.2d 684, 688 (1991)*; *American Realty Trust v. Chase Manhattan Bank, 222 Va. 392, 403, 281 S.E.2d 825, 831 (1981)*; *Roanoke Ry. & Elec. Co. v. Virginian Ry. Co., 159 Va. 289, 293–94, 165 S.E. 398, 399 (1932)*; *People's Bank v. People's Nat'l Bank, 148 Va. 651, 657, 139 S.E. 325, 326–27 (1927)*; *Revell v. Ballard, 144 Va. 371, 374, 132 S.E. 322, 323 (1926)*; *Chesapeake & Potomac Tel. Co. v. Wythe Mut. Tel. Co., 142 Va. 529, 539, 129 S.E. 389, 392 (1925)*; *Citizens' Bank v. Taylor & Co., 104 Va. 164, 167–68, 51 S.E. 159, 160 (1905).*

### PRACTICE COMMENTARY

Where there is doubt about the meaning of the terms of a contract, the parties' actions after it is signed often are dispositive of the question of what the parties intended. *Revell, 144 Va. at 374, 132 S.E. at 323*; *Bentley Funding Grp., 269 Va. at 332, 609 S.E.2d at 57.* Parol evidence is admissible to define ambiguous terms in a written contract. Under the "partial integration doctrine," where the entire agreement has not been reduced to writing, additional independent facts contemporaneously agreed upon may be shown in order to establish the entire contract between the parties. *Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner, 225 Va. 508, 515–16, 303 S.E.2d 894, 898 (1983).*

"[C]ourse of performance when employed to interpret a contract . . . . is an expression by the parties of the meaning that they gave to the terms of the contract they made." Corbin on Contracts § 24.16; see also *id.* § 24.17 (course of dealing).

Not all acts of the parties can qualify as subsequent interpretations; the terms of the contract must be ambiguous first. *People's Bank, 148 Va. at 657, 139 S.E. at 326–27.* Further, the acts must be of a specific type: they must have been done pursuant to and by reason of the contract; *Roanoke Ry. & Elec. Co., 159 Va. at 293–94, 165 S.E. at 399;* the act must have been free from constraint with full knowledge of the act's import; and the interpretation advanced by the parties' construction must be reasonable and not at variance with the terms of the contract. *Citizens' Bank, 104 Va. at 167–68, 51 S.E. at 160.*

### *ALERTS:*

- This instruction is proper only if the court has determined that the contract is ambiguous. Ambiguity is defined as "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time . . . . Doubtfulness; doubleness of meaning . . . of an

expression used in a written instrument." *Fried v. Smith, 244 Va. 355, 357, 421 S.E.2d 437, 438 (1992).*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.340
## Custom and Usage of Trade

**The customs and usages of the trade may be shown to establish a point on which the contract is silent or unclear.**

**To show the existence of a custom or usage of the trade, a party must prove by the greater weight of the evidence that the custom was well established, known to the contracting parties, and generally followed in the trade at the time the contract was made. You may presume knowledge by the contracting parties where the parties are engaged in the same trade or if the custom and usage is uniform and notorious where the contract is to be performed.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.1A-303 (contracts under the UCC).

**Case Authority:** *Westmoreland-LG&E Partners v. Virginia Elec. & Power Co., 254 Va. 1, 9, 486 S.E.2d 289, 293 (1997)*; *Arkla Lumber & Mfg. Co. v. West Virginia Timber Co., 146 Va. 641, 649–50, 132 S.E. 840, 842 (1926)*; *Rosenberg v. Turner, 124 Va. 769, 775, 98 S.E. 763, 765 (1919)*; *Walker v. Gateway Milling Co., 121 Va. 217, 221–22, 92 S.E. 826, 827–28 (1917)*; *Sutherland & Co. v. Gibson, 117 Va. 840, 843–44, 86 S.E. 108, 109 (1915)*; *Scott v. Chesterman, 117 Va. 584, 597–98, 85 S.E. 502, 507 (1915)*; *City of Richmond v. Barry, 109 Va. 274, 285, 63 S.E. 1074, 1078 (1909)*.

## Practice Commentary

That the parties used custom or usage to fill out the contract's terms is established by proving that the parties, knowing of an established custom or usage of trade, contracted with reference to it. *Walker, 121 Va. at 223, 92 S.E. at 828; Arkla Lumber & Mfg. Co., 146 Va. at 649–50, 132 S.E. at 842.*

The party advancing the custom must show three things. First, the custom must be certain, general, uniform and recognized, and so well settled as to be presumed to be known to all the parties. *Arkla Lumber & Mfg. Co., 146 Va. at 649–50, 132 S.E. at 842*. Second, the party advancing the custom must prove that the usage or custom was one generally followed at the time the contract was signed and at the place where it was to be performed. *Id. at 650*. Finally, the custom and usage must not vary or contradict the terms of the contract. *Id. at 649*.

Where words in the contract are intended to have a meaning other than the plain and ordinary meaning normally associated with them, evidence of custom is received to aid in the interpretation of those words. *Walker, 121 Va. at 222, 92 S.E. at 827–28*. The contract need not be ambiguous to allow evidence of custom to come in on this issue. *Id.*

The standard attack on this position is that seen in *Walker*: that admitting evidence of custom and usage is admitting extrinsic evidence to contradict the unambiguous terms of the contract. *Sutherland & Co., 117 Va. at 843–44, 86 S.E. at 109*. The court in *Walker* specifically held that "admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence." *Walker, 121 Va. at 221–22, 92 S.E. at 827*. The evidence of custom "was not designed to vary or contradict the contract, but to interpret certain terms used therein which, under the plaintiff's theory and contention, had an accepted and established trade meaning, not contradictory of but entirely consistent with the contract." *Id. at 221, 92 S.E. at 827.*

Extrinsic evidence of custom is also received to add provisions to the contract. The contract must be silent or ambiguous on the matter affected by the custom, and the custom cannot vary or contradict the terms of the contract. *Barry, 109 Va. at 281, 63 S.E. at 1077; Scott, 117 Va. at 597–98, 85 S.E. at 507; Sutherland & Co.,*

*117 Va. at 843–44, 86 S.E. at 109.*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.400
## Material Breach of Contract

**A material breach of contract occurs if a party fails to do something which he is bound to do according to the contract which is so important and central to the contract that the failure defeats an essential purpose of the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-703, 8.2-711 (contracts under the UCC).

**CASE AUTHORITY:** *Countryside Orthopaedics, P.C. v. Peyton, 261 Va. 142, 154, 541 S.E.2d 279, 285 (2001)*; *Horton v. Horton, 254 Va. 111, 115–16, 487 S.E.2d 200, 204 (1997)*; *Spotsylvania County Sch. Bd. v. Seaboard Sur. Co., 243 Va. 202, 211, 415 S.E.2d 120, 125 (1992)*; *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 219 Va. 111, 118, 244 S.E.2d 774, 778 (1978)*; *Sternheimer v. Sternheimer, 208 Va. 89, 97–98, 155 S.E.2d 41, 47 (1967)*; *Williams v. Snider, 190 Va. 226, 232, 56 S.E.2d 63, 66 (1949)*; *Haynes Chem. Corp. v. Staples & Staples, Inc., 133 Va. 82, 89, 112 S.E. 802, 805 (1922)*; *Ragland & Co. v. Butler, 59 Va. (18 Gratt.) 323, 333 (1868)*.

## PRACTICE COMMENTARY

A party to a contract has no right to breach the contract. However, if a party does breach, then the other party has a remedy for compensatory damages or, if the breach is material, he may cancel or repudiate the contract. See Restatement 2d of Contracts § 243.

If a party fails or refuses to do anything that he has contractually agreed to do, he is guilty of breach of contract. A material breach of contract, however, may only be occasioned upon the failure to do something which is so important and material or of such a substantial character as to defeat the object of the parties in making the contract. *Sternheimer, 208 Va. at 97–98, 155 S.E.2d at 47.* Where both parties have expressly agreed that time is of the essence in the contract, failure to perform within the specified time is a material breach. *Boatright v. Peaks, 190 Va. 768, 773, 57 S.E.2d 895, 897 (1950)*; *Boston v. Shackelford, 162 Va. 733, 755, 175 S.E. 625, 633 (1934)*. However, the breach may be waived if the non-breaching party treats the contract as still in force. *Goldstein v. Old Dominion Peanut Corp., 177 Va. 716, 726, 15 S.E.2d 103, 106 (1941)*.

Examples of material breaches are the failure to receive property under a contract calling for the delivery of property, *Ragland & Co., 59 Va. at 333*; the refusal to divide purchased property under a contract calling for the joint purchase and division of property, *Barnes v. Morrison, 97 Va. 372, 377–78, 34 S.E. 93, 94–95 (1899)*; refusal to perform services after money has been forwarded for the expected services, *Haynes, 133 Va. at 89, 122 S.E. at 805*; failure to prepare a roadway site so guardrails could be installed, *R.G. Pope Constr. Co., 219 Va. at 118, 244 S.E.2d at 778;* and failure to appoint an attorney-in-fact to execute deeds and other documents, *Horton, 254 Va. at 115–16, 407 S.E.2d at 203–04*.

### *Initial Breach*

If a party commits the first breach of a contract, and if the breach is material, that party cannot enforce the contract, and the other party to the contract is excused

from performing his contractual obligations. *Countryside Orthopaedics, P.C., 261 Va. at 154, 539 S.E.2d at 285*; *Horton, 254 Va. at 115–16, 487 S.E.2d at 204.*

***Partial Failure of Performance***

If a party has performed all material parts of the contract but has failed to perform all of his obligations fully and properly, the contract remains in force and the only remedy is damages for the breach. *Neely v. White, 177 Va. 358, 366–67, 14 S.E.2d 337, 340–41 (1941).*

***Anticipatory Breach***

An anticipatory breach of contract occurs when a party refuses to perform the contract before the time for performance. His refusal must be absolute and leave no doubt. It must apply to the entire performance required by the contract. *Vahabzadeh v. Mooney, 241 Va. 47, 51, 399 S.E.2d 803, 805 (1991)*; *Simpson v. Scott, 189 Va. 392, 400, 53 S.E.2d 21, 24 (1949).*

A party's renunciation or abandonment of his or her contractual duties, after performance has commenced under a contract requiring continuous performance, constitutes a repudiation which may be treated by the party to whom the duty is owed as an anticipatory breach. *Bennett v. Sage Payment Solutions, Inc., 282 Va. 49, 57–58, 710 S.E.2d 736, 741 (2011).*

A mere declaration of intention not to perform, which is retracted immediately and which did not cause the other party to change his position, will not suffice as an anticipatory breach. 4A M.J., Contracts § 75.

Upon anticipatory repudiation of a contract, the injured party has several options. He may elect to rescind the contract altogether; he may treat the repudiation as a breach; or he may treat the contract as continuing until the performance of the other party is due and then bring suit. *Simpson, 189 Va. at 398, 53 S.E.2d at 23–24.*

☞***PRACTICE POINTER:*** Anticipatory repudiation by less than all co-obligors does not establish a breach of contract. *Link v. Weizenbaum, 229 Va. 201, 203–04, 326 S.E.2d 667, 668–69 (1985).*

***ALERTS:***

- In *Spotsylvania County School Board*, the words "material and substantial" were used in an instruction otherwise identical to the wording of this instruction. It was error to use "material" since the express terms of that contract said the test for breach was a "substantial" violation, *243 Va. at 211–12, 415 S.E.2d at 125–26.*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.410**
**Waiver**

**A waiver occurs when a party intentionally gives up a** [contractual; legal] **right which would have been beneficial to him. A waiver may be expressly stated or it may be implied from conduct. A party cannot waive a right unless he has full knowledge of it.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.2-209 (contracts under the UCC).

**Case Authority:** *Stockbridge v. Gemini Air Cargo, Inc., 269 Va. 609, 620, 611 S.E.2d 600, 605 (2005)*; *Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., 267 Va. 642, 651–52, 595 S.E.2d 1, 6 (2004)*; *Stanley's Cafeteria, Inc. v. Abramson, 226 Va. 68, 74, 306 S.E.2d 870, 873 (1983)*; *Employers Commercial Union Ins. Co. of America v. Great American Ins. Co., 214 Va. 410, 412–13, 200 S.E.2d 560, 562 (1973)*; *May v. Martin, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964)*; *Tiedman v. American Pigment Corp., 253 F.2d 803, 807 (4th Cir. 1958)*; *Woodmen of World Life Ins. Soc'y v. Grant, 185 Va. 288, 299, 38 S.E.2d 450, 454 (1946)*; *Goldstein v. Old Dominion Peanut Corp., 177 Va. 716, 728, 15 S.E.2d 103, 107 (1941)*; *Reid v. Field, 83 Va. 26, 32–33, 1 S.E. 395, 399–400 (1887)*.

## Practice Commentary

Waiver is an intentional relinquishment of a known right. *Stockbridge, 269 Va. at 620, 611 S.E.2d at 605*; *Stanley's Cafeteria, 226 Va. at 74, 306 S.E.2d at 873*. The two elements which are necessary to establish waiver are "knowledge of the facts basic to the exercise of the right" and the "intent to relinquish that right." *Va. Polytechnic Inst. & State Univ., 267 Va. at 651–52, 595 S.E.2d at 6*; *Employers Commercial Union Ins. Co. of America, 214 Va. at 412–13, 200 S.E.2d at 562*.

Under a continuing contract, if a party registers complaints and he is assured of future improvement in products or services, he has not waived future assertion of his rights. *Tiedman, 253 F.2d at 807*.

The waiver of one breach is not a waiver of a subsequent breach. If the breach is continuing, then a waiver of a right of re-entry for one breach will not preclude a re-entry for a new or continuing breach. *General Appliance Storage Co. v. Richmond, Fredericksburg & Potomac R.R., 221 Va. 176, 179, 267 S.E.2d 161, 163 (1980)*.

A person can ratify an invalid contract by adopting it. The person must knowingly intend to waive his right not to be bound by the invalid contract. It must plainly appear either from his words or from his acts and conduct that he had full knowledge of his right and a distinct intention to waive it. *Upton & Walker v. R.D. Holloway & Co., 126 Va. 657, 664, 102 S.E. 54, 56 (1920)*; *Bradley v. Tolson, 117 Va. 467, 472–73, 85 S.E. 466, 467–68 (1915)*.

An implied waiver must be established by clear and convincing evidence. *Stockbridge, 269 Va. at 621, 611 S.E.2d at 606*; *Baumann v. Capozio, 269 Va. 356, 361, 611 S.E.2d 597, 600 (2005)*.

A waiver of (or a promise not to raise) a defense based on an expired statute of limitations is invalid and unenforceable unless it meets the specific requirements of Virginia Code § 8.01-232: (i) it is made to avoid or defer litigation pending settlement of a case; (ii) it is not made contemporaneously with any other contract; and (iii) it is made for an additional term not longer than the applicable limitations

period. *Radiance Capital Receivables Fourteen, LLC v. Foster, 298 Va. 14, 19–20, 833 S.E.2d 867, 869 (2019).*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.420
## Modification

**A written contract may be modified or changed by a later** [oral; written] **agreement. Both parties must agree to the modification. A mutual intent to modify may be either expressly stated or implied from conduct. The intent must be proved by clear and convincing evidence.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.2-209 (contracts under the UCC).

**Case Authority:** *Reid v. Boyle, 259 Va. 356, 369–70, 527 S.E.2d 137, 144–45 (2000)*; *Stanley's Cafeteria, Inc. v. Abramson, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)*; *Zurich Gen. Accident & Liability Ins. Co. v. Baum, 159 Va. 404, 408–09, 165 S.E. 518, 519 (1932)*; *Warren v. Goodrich, 133 Va. 366, 391–92, 112 S.E. 687, 694 (1922).*

## Practice Commentary

It is a well-established legal proposition that a written contract may be modified, or a new one substituted for it, by a subsequent parol contract even where the original contract is unambiguous and certain in its terms. A parol agreement can modify an original written contract, even though the contract contains a provision that it cannot be substantially varied except by writing. This is so because the provision itself is rescinded by parol agreement. *Reid, 259 Va. at 369–70, 527 S.E.2d at 144–45.* There is, however, an exception: "[i]f any written contract to which a financial institution is a party contains a provision to the effect that no amendment or waiver of any terms or provisions thereof shall be valid unless such amendment or waiver is in writing, then any amendment or waiver of any terms or provisions of that contract by conduct, course of practice or dealing, or otherwise shall not apply to future rights and obligations under that contract unless it is in writing." Va. Code Ann. § 6.2-107.

A written contract may also be impliedly modified by a subsequent course of dealings between the parties and by an acquiescence to this modification, amounting to a waiver, by the party whose right has been affected. *Stanley's Cafeteria, 226 Va. at 73–74, 306 S.E.2d at 873.*

The party asserting the modification carries the burden of proof in demonstrating that the minds of the parties definitely met on the alteration. He must produce clear and convincing evidence of mutual intent to deviate from the original contract. *Warren, 133 Va. at 388–89, 112 S.E. at 693–94.* See Instruction No. 3.110, Standard of Proof: Definition of Clear and Convincing Evidence.

## *ALERTS:*

- The statute of frauds may apply to the modification. For contracts under the UCC, see Va. Code Ann. §§ 8.2-201, 8.2-209(3).

## *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice, Chapter 24

Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure § 2.3

Kent Sinclair, Virginia Remedies, Chapters 36, 38, 40

Michie's Jurisprudence, Contracts §§ 1 through 140

## Instruction No. 45.430
## Mutual Rescission

**The parties to a contract can agree to cancel their contract. If there is agreement to cancel the contract, one party cannot recover damages from the other unless he expressly reserved that right at the time of cancellation.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** See Va. Code Ann. § 8.2-209 (contracts under the UCC).

**CASE AUTHORITY:** *Plant Lipford, Inc. v. E.W. Gates & Son Co., 141 Va. 325, 335; 127 S.E.183, 186 (1925)*; *Juniper Lumber Co. v. John M. Nelson, Jr., Inc., 133 Va. 146, 152–53, 112 S.E. 564, 566 (1922).*

### PRACTICE COMMENTARY

Parties to a contract may mutually rescind, abrogate, release, or cancel their contract. If one party attempts to rescind the contract, rescission is by mutual consent if the other party agrees to the rescissions. *Juniper Lumber, 133 Va. at 154, 112 S.E. at 566.*

If no intent to reserve the right to sue for previous breaches is shown, the rescission is absolute. *Id. at 155, 112 S.E. at 566.* A reservation of the right to recover damages arising out of a prior breach is ineffective if made by silence, mental reservation or equivocal language. The right should be reserved expressly, and the burden to show that the reservation rested on mutual understanding is on the party claiming the right to sue. *Id. at 157, 112 S.E. at 567.* The rights of the parties arising from a cancellation depend upon their intention which is deduced from the agreement of cancellation construed in light of the surrounding circumstances. *Id. at 152, 112 S.E. at 566.*

Where one party breaches a contract, the non-breaching party may seek equitable rescission of the contract. "If rescission is granted, the contract is terminated for all purposes, and the parties are restored to the status quo ante." *Young-Allen v. Bank of Am., N.A., 298 Va. 462, 839 S.E.2d 897, 900 (2020).* Rescission based upon a breach of contract is not a cause of action in itself, but rather a remedy, which is available only when the underlying breach is substantial or material. *Id.* Moreover, the Supreme Court of Virginia has noted, "equitable rescission is a remedy which calls for the highest and most drastic exercise of the power of a court of chancery—to annul and set at naught the solemn contracts of parties." *Id.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.440
## Preventing Performance

**A party to a contract who purposefully [hinders; prevents; makes it impossible for] the other party [from; to] performing his obligations under a contract has breached the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Rastek Constr. & Dev. Corp. v. Gen. Land Commercial Co., LLC, 294 Va. 416, 425–31, 806 S.E.2d 740, 745–49 (2017)*; *Spotsylvania County Sch. Bd. v. Seaboard Sur. Co., 243 Va. 202, 209–10, 415 S.E.2d 120, 124 (1992)*; *R.G. Pope Constr. Co. v. Guard Rail, 219 Va. 111, 119–21, 244 S.E.2d 774, 780 (1978)*; *Whitt v. Godwin, 205 Va. 797, 800, 139 S.E.2d 841, 844 (1965)*; *Boggs v. Duncan, 202 Va. 877, 882, 121 S.E.2d 359, 363 (1961).*

## PRACTICE COMMENTARY

If one of the contracting parties prevents the other party from performing under a contract, he cannot prevail since he himself has brought about that nonperformance. *Whitt, 205 Va. at 800, 139 S.E.2d at 844.*

The party prevented from performing may treat the contract as terminated, and he may recover the damages that he sustained. *Boggs, 202 Va. at 882, 121 S.E.2d at 363.*

## *ALERTS:*

- This principle does not apply when the hindrance is due to action taken by a party that he is permitted to take under the terms of the contract. *Seaboard Sur. Co., 243 Va. at 209, 415 S.E.2d at 124.*

## Instruction No. 45.450
## Impossibility as Defense

**A party is excused from his failure to perform a contract if performance became impossible after the contract was made. Where a party relies on impossibility as a defense, he must prove by the greater weight of the evidence:**

**(1) that performance of his obligations under the contract was rendered impossible; and**

**(2) that he did not cause the circumstance which made his performance impossible; and**

**(3) that the circumstance which rendered performance impossible was not reasonably foreseeable when the parties made the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-615 (contracts under the UCC).

**CASE AUTHORITY:** *Hampton Roads Bankshares, Inc. v. Harvard, 291 Va. 42, 53–54, 781 S.E.2d 172, 177–78 (2016)*; *Long Signature Homes v. Fairfield Woods, 248 Va. 95, 98–99, 445 S.E.2d 489, 491–92 (1994)*; *Housing Auth. v. East Tenn. Light & Power Co., 183 Va. 64, 74, 31 S.E.2d 273, 277 (1944)*; *Caldwell v. Commonwealth, 55 Va. (14 Gratt.) 698, 703 (1858).*

## PRACTICE COMMENTARY

In Virginia, performance of the condition or conditions of a contract is excused where performance is rendered impossible by an act of God, of the law, or of the obligee. An act of God is any misfortune or accident arising out of an inevitable necessity which a reasonably prudent man could not foresee or prevent. *Sanders v. Coleman, 97 Va. 690, 694, 34 S.E. 621, 622 (1899).*

An act of the obligee that excuses performance or tender of performance by the other party is any act which absolutely repudiates the contract in question by denying its existence. *Barnes v. Morrison, 97 Va. 372, 378, 34 S.E. 93, 95 (1899).*

If, from the nature and terms of the contract itself, it can be said that the parties must have contracted on the basis of the continued existence of some substance, a condition is implied that, if performance becomes impossible because that substance does not exist, the nonexistence of the substance will excuse performance. *Paddock v. Mason, 187 Va. 809, 815, 48 S.E.2d 199, 202 (1948)*; *Virginia Iron, Coal & Coke Co. v. Graham, 124 Va. 692, 701, 98 S.E. 659, 662 (1919).*

Performance will not be excused, on the other hand, if the parties contracted with reference to some material which subsequent developments rendered of a different value than at the time of contracting. In *Gunnell v. Nello L. Teer Co., 205 Va. 28, 135 S.E.2d 104 (1964)*, for example, performance under a contract for the purchase of dirt fill was not excused when it subsequently developed that the material was not of a quality which could be used by the party purchasing the fill.

Ordinarily, a supervening condition that makes performance of the contract temporarily impossible will not release the duty of performance, but will only suspend that obligation. *Long Signature Homes, 248 Va. at 99, 445 S.E.2d at 491.*

For a case where the parties disagreed over the interpretation of an arbitration clause and whether the doctrine of impossibility applied to that clause, see *Brush Arbor Home Constr. v. Alexander, 297 Va. 151, 823 S.E.2d 249 (2019).*

## *ALERTS:*

None.

## *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.460
## Undue Influence

**Undue influence occurs when one person has overcome the free will of another person and induces the other person to** [do; not do] **what he otherwise would** [not have done; have done]**. If a party entered into a contract as a result of undue influence, then the contract cannot be enforced against him. Undue influence must be proven by clear and convincing evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Parfitt v. Parfitt, 277 Va. 333, 339–40, 672 S.E.2d 827, 829 (2009)*; *Bailey v. Turnbow, 273 Va. 262, 267, 639 S.E.2d 291, 293 (2007)*; *Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 31, 597 S.E.2d 34, 38 (2004)*; *Mullins v. Coleman, 175 Va. 235, 239, 7 S.E.2d 877, 878 (1940)*; *Tabb v. Willis, 155 Va. 836, 858, 156 S.E. 556, 563 (1931)*; *Waddy v. Grimes, 154 Va. 615, 642, 153 S.E. 807, 815 (1930)*; *Jenkins v. Trice, 152 Va. 411, 429–30, 147 S.E. 251, 257 (1929).*

### PRACTICE COMMENTARY

Undue influence is any means employed upon a person to induce him to enter into a transaction which, under the circumstances, he could not well resist because the influencer controlled his volition and induced him to do what otherwise he would not have done. Influence which is gained by kindness and affection is not regarded as "undue" even though it induces a testator to make an unjust disposition of property. *Waddy, 154 Va. at 642–43, 153 S.E. at 815.* Solicitation, persuasion, and entreaty are not "undue," so long as the person's will remains intact. *Jenkins, 152 Va. at 429, 147 S.E. at 257.*

"To set aside a deed or contract on the basis of undue influence requires a showing that the free agency of the contracting party has been destroyed. Because undue influence is a species of fraud, the person seeking to set aside the contract must prove undue influence by clear and convincing evidence." *Bailey, 273 Va. at 267, 639 S.E.2d at 293.*

"[A] presumption of undue influence rises and the burden of going forward with the evidence shifts when weakness of mind *and* grossly inadequate consideration or suspicious circumstances are shown *or* when a confidential relationship is established." *Friendly Ice Cream Corp., 268 Va. at 33, 597 S.E.2d at 39.* "This presumption will satisfy the plaintiff's burden of proving undue influence unless it is rebutted. The defendant therefore has the burden of producing evidence sufficient to rebut the presumption." *Parfitt, 277 Va. at 340, 672 S.E.2d at 829.*

☞ ***PRACTICE POINTER:*** For related issues, see also Instruction No. 45.470, Duress and Instruction No. 48.070, Undue Influence.

☞ ***PRACTICE POINTER:*** Reasonable attorney's fees and costs may be awarded to a plaintiff when the court finds, by clear and convincing evidence, that a deed, contract or other instrument was obtained by fraud or undue influence on the part of the defendant. Va. Code Ann. § 8.01-221.2.

Acts that constitute duress also constitute undue influence. Acts that constitute undue influence, however, do not always rise to the level of duress. See Instruction No. 45.470, Duress. Since either will make a contract unenforceable, the distinction is now largely academic.

### *ALERTS:*

None.

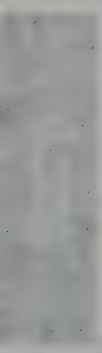
***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140



## Instruction No. 45.470
## Duress

**Duress is any wrongful act or threat by a person that, under the circumstances, overcomes the free will of another person and induces him to do what he otherwise would not have done. If a party entered into a contract as a result of duress, then the contract cannot be enforced against him. Duress must be proven by clear and convincing evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Goode v. Burke Town Plaza, 246 Va. 407, 411, 436 S.E.2d 450, 452–53 (1993)*; *Jacobs v. Jacobs, 218 Va. 264, 267, 237 S.E.2d 124, 126 (1977)*; *Bond v. Crawford, 193 Va. 437, 444, 69 S.E.2d 470, 475 (1952)*; *Vick v. Siegel, 191 Va. 731, 734–35, 62 S.E.2d 899, 900–01 (1951)*; *Scott v. Scott, 142 Va. 31, 39–40, 128 S.E. 599, 601 (1925)*; *Ford v. Engleman, 118 Va. 89, 94–95, 86 S.E. 852, 855 (1915)*; *Harris v. Cary, 112 Va. 362, 369, 71 S.E. 551, 554 (1911)*.

### PRACTICE COMMENTARY

Duress is no longer limited to actions that cause personal restraint, fear of personal injury, or imprisonment. The term includes any wrongful acts that compel a person, such as a grantor of a deed, to allow a transaction without volition, or that cause enough fear that he cannot exercise his free will and judgment in entering into a transaction. *Jacobs, 218 Va. at 267, 237 S.E.2d at 126 (1977)*.

"Duress exists when one of the parties to the contract commits a wrongful act sufficient to prevent a party from exercising his free will, thereby coercing the party's consent." *Goode, 246 Va. at 411, 436 S.E.2d at 452*. The threatened act must be wrongful to constitute duress. *Id., 246 Va. at 411 and 436 S.E.2d at 453*, A threat to do what one has a legal right to do, such as to foreclose a mortgage, will not justify rescission of a contract induced by such a threat. *Bond, 193 Va. at 444, 69 S.E.2d at 475*.

☞***PRACTICE POINTER:*** On the related topic of Undue Influence, see also Instruction No. 45.460. See also Instruction No. 48.070, Undue Influence.

At common law, duress connoted physical violence or restraint, and undue influence consisted of mental pressure. Now the distinction is largely academic. See Instruction No. 45.460, Undue Influence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.480**
**Fraud in the Inducement**

**A party is excused for his failure to perform a contract if he was induced to enter into the contract by fraud. Fraud must be proven by clear and convincing evidence.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 362, 699 S.E.2d 483, 489 (2010)*; *Station # 2, LLC v. Lynch, 280 Va. 166, 172–73, 695 S.E.2d 537, 540–41 (2010)*; *Davis v. Marshall Homes, Inc., 265 Va. 159, 165–66, 576 S.E.2d 504, 506–07 (2003)*; *Langman v. Alumni Ass'n, 247 Va. 491, 502, 442 S.E.2d 669, 677 (1994)*; *J.E. Robert Co. v. J. Robert Co., 231 Va. 338, 343–44, 343 S.E.2d 350, 353–54 (1986)*; *Ware v. Scott, 220 Va. 317, 319, 257 S.E.2d 855, 857 (1979)*; *George Robberecht Seafood, Inc. v. Maitland Bros., 220 Va. 109, 111–12, 255 S.E.2d 682, 683 (1979)*; *Piedmont Trust Bank v. Aetna Cas. & Sur. Co., 210 Va. 396, 400, 171 S.E.2d 264, 267 (1969)*; *Harris v. Dunham, 203 Va. 760, 767, 127 S.E.2d 65, 70 (1962)*; *B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 315, 99 S.E.2d 606, 609 (1957)*; *Packard Norfolk, Inc. v. Miller, 198 Va. 557, 561–62, 95 S.E.2d 207, 210 (1956)*; *Jefferson Std. Life Ins. Co. v. Hedrick, 181 Va. 824, 833–34, 27 S.E.2d 198, 202 (1943)*; *Shoemaker v. Cake, 83 Va. 1, 7, 1 S.E. 387, 390–91 (1887)*; *Mason v. Chappell, 56 Va. (15 Gratt.) 572, 582 (1860).*

## Practice Commentary

A false representation, relied upon by another to his damage, gives rise to a cause of action for false representation, whether knowingly or innocently made. In the first instance, the fraud is actual; in the second, it is constructive. *B-W Acceptance Corp., 199 Va. at 315, 99 S.E.2d at 609.* A false representation of material fact, which is an inducement to the contract and upon which a party relies, is ground for rescission of a contract and may also be grounds for damages. *Abi-Najm, 280 Va. at 362, 699 S.E.2d at 489.* Fraud in the inducement must be based upon a misrepresentation of preexisting fact and may not be predicated upon unfulfilled promises or statements as to future events. *Id. at 362–63, 699 S.E.2d at 490.* As to the doctrine of *caveat emptor* and the duty to investigate, see the Practice Commentary to Instruction No. 39.050, Duty to Investigate.

When this instruction is used, fraud will have to be defined in general terms, and any elements of it that are particularly disputed will have to be elaborated upon. The instructions in Chapter 39, Fraud, may be used as models.

The burden of proof when fraud is alleged is clear and convincing. *Sweely Holdings, LLC v. SunTrust Bank, 296 Va. 367, 381–82, 820 S.E.2d 596, 604 (2018).*

For a discussion of fraud in the inducement by an LLC see *Orthopedic & Sports Physical Therapy Assocs. v. Summit Group Props, LLC, 283 Va. 777, 724 S.E.2d 718 (2012).*

☞ ***Practice Pointer:*** The defense of fraud in the inducement should be included in the issues instruction and the finding instruction. For the definition of clear and convincing evidence, see Instruction No. 3.110.

☞ ***Practice Pointer:*** Reasonable attorney's fees and costs may be awarded to a plaintiff when the court finds, by clear and convincing evidence, that a deed, contract or other instrument was obtained by fraud or undue influence on the part

of the defendant. Va. Code Ann. § 8.01-221.2.

☞ ***PRACTICE POINTER:*** "A victim of fraudulent inducement may rescind the contract or affirm the contract and sue for damages." A party suing for contract damages affirms the contract and consents to be bound by its provisions. *CGI Fed. Inc. v. FCi Fed., Inc., 295 Va. 506, 520, 814 S.E.2d 183, 191 (2018).*

☞ ***PRACTICE POINTER:*** If a contract is unenforceable due to fraudulent inducement, a party may not recover benefit-of-bargain damages in the form of lost profits. *CGI Fed. at 518, 814 S.E.2d at 190.*

### ***ALERTS:***

None.

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.500**
**Damages: Direct**

**If you find your verdict for the plaintiff, then he is entitled to recover as damages all of the losses he sustained** [, including gains prevented,] **that are a natural and ordinary result of the breach and that he has proved by the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 8.2-708 to 8.2-718 (contracts under the UCC).

**CASE AUTHORITY:** *Smith v. McLaughlin, 289 Va. 241, 265, 769 S.E.2d 7, 19–20 (2015)*; *Isle of Wight County v. Nogiec, 281 Va. 140, 149, 704 S.E.2d 83, 87 (2011)*; *Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 156, 671 S.E.2d 132, 136 (2009)*; *Commercial Bus. Sys. v. Bellsouth Servs., 249 Va. 39, 49–50, 453 S.E.2d 261, 268–69 (1995)*; *Fauntleroy v. Walker, 220 Va. 168, 170, 257 S.E.2d 766, 767 (1979)*; *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 801, 214 S.E.2d 155, 160 (1975)*; *Appalachian Power Co. v. John Stewart Walker, Inc., 214 Va. 524, 535, 201 S.E.2d 758, 767 (1974)*; *Silvey v. Johnston, 193 Va. 677, 683–84, 70 S.E.2d 280, 283–84 (1952)*; *E.I. du Pont de Nemours & Co. v. Universal Moulded Prods., Corp., 191 Va. 525, 568–69, 62 S.E.2d 233, 253 (1950)*; *Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 588–89, 194 S.E. 727, 732–33 (1938)*; *Shenandoah Milling Co. v. Phosphate Prods. Corp., 161 Va. 642, 649, 171 S.E. 681, 683 (1933)*; *Matthews v. LaPrade, 144 Va. 795, 801–02, 130 S.E. 788, 790 (1925)*; *Lehigh Portland Cement Co. v. Virginia S.S. Co., 132 Va. 257, 270, 111 S.E. 104, 108–09 (1922)*; *Smith v. Packard, 94 Va. 730, 733, 27 S.E. 586, 587–88 (1897)*.

## PRACTICE COMMENTARY

The objective in breach-of-contract damages is to put the injured party, so far as can be done by money, in the same position as if the contract had been performed. *Lehigh Portland Cement Co., 132 Va. at 270, 111 S.E. at 109.*

In determining reasonable compensation, the contract furnishes the criterion for the measure of remuneration. For example, a successful contractor plaintiff is entitled to recover the contract price less whatever amount may fairly be deducted to compensate the defendant for any incomplete or defective work. *Smith, 94 Va. at 733, 27 S.E. at 587–88.*

☞ ***PRACTICE POINTER:*** When damages are indirect, consider Instruction No. 45.530, Damages: Consequential.

### *Causation of Damages*

The damages recoverable for breach of contract must be the direct and natural result of the breach. *Isle of Wight County, 281 Va. at 149, 704 S.E.2d at 87*; *Appalachian Power Co., 214 Va. at 535, 201 S.E.2d at 767, E.I. du Pont de Nemours Co., 191 Va. at 568–69, 62 S.E.2d at 253*. In an action *ex contractu*, the plaintiff bears the burden of establishing a causal connection between the defendant's breach and the damages claimed. *Haass & Broyles Excavators, Inc. v. Ramey Bros. Excavating Co., 233 Va. 231, 235, 355 S.E.2d 312, 315 (1987).*

The test for awarding damages for breach of contract is whether the damage is natural or within the actual or potential contemplation of the parties at the time the contract was created. To justify recovery, damages must be both natural and proximate. *Washington & Old Dominion Ry. v. Westinghouse Electric & Mfg. Co.,*

*120 Va. 620, 628, 89 S.E. 131, 133 (1916); modified on reh'g, 120 Va. 620, 636–37, 91 S.E. 646, 648 (1917).* Damages must also be the logical result of the breach.

A cause of action for legal malpractice is contractual in nature and therefore non-pecuniary damages are not recoverable regardless of the foreseeability of such losses. *Smith v. McLaughlin, 289 Va. 241, 265, 769 S.E.2d 7, 20 (2015).*

***Certainty of Damages***

Instruction No. 45.510 states the rule that proof must establish a reasonable estimate of the amount of damages. Uncertainty in the amount of damages is not fatal to recovery of damages; the jury is allowed to speculate to some extent. *Kiser, 169 Va. at 588, 194 S.E. at 732–33.*

A plaintiff is required to provide only a reasonable basis for computation of damages. *Barnes v. Graham Va. Quarries, Inc., 204 Va. 414, 418, 132 S.E.2d 395, 397 (1963); Worrie v. Boze, 198 Va. 533, 542, 95 S.E.2d 192, 200 (1956), aff'd on reh'g, 198 Va. 891, 96 S.E.2d 799 (1957); Fauntleroy, 220 Va. at 170, 257 S.E.2d at 767.*

The jury may not assess uncertain, speculative, or contingent damages. *Isle of Wight County, 281 Va. at 147, 704 S.E.2d at 85.* In *Silvey, 193 Va. at 683–84, 70 S.E.2d at 283–84*, the court decided that the requirements of proof with respect to estimating damages were only met if the facts and circumstances in evidence were such as to permit an intelligent and reasonably correct estimate of damages or loss incurred as a direct consequence of the breach.

In *Matthews*, the court instructed the jury that the usual measure of damages for the breach of a contract was the amount of the loss sustained by the injured party. If the breach consisted of preventing performance of the contract and one party was willing to perform it, then two distinct possible grounds existed for damages:

First, what he has already expended towards performance; secondly, the profits that he would realize by performing the contract. The second item, profits, cannot always be recovered. They may be too remote or speculative in their character and therefore incapable of that clear and direct proof which the law requires. But when they are the direct and immediate fruits of the contract, they are free from this objection; they are then part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. *144 Va. at 801–02, 130 S.E. at 790.*

The loss of future profits is a proper basis for damages from breach of a contract when they may be computed with reasonable certainty. The burden of establishing this is on the plaintiff. *Shenandoah Milling Co, 161 Va. at 649, 171 S.E. at 683; Commercial Bus. Sys., 249 Va. at 49–50, 453 S.E.2d at 268–69.*

***Defective Construction—Cost and Value Rules***

The method or rule for computing damages in cases of defective construction depends on the character and extent of the defects. If the defect is remediable from a practical standpoint, the "cost rule" applies and recovery generally will be based

on the market price of completing or correcting the performance. This is generally the cost of getting the work completed by someone else.

However, if completion is not possible or if it involves unreasonable economic waste, then the "value rule" applies and damages are the difference between the value of the defective structure and its value if properly completed. *Lochaven Co. v. Master Pools by Schertle, Inc., 233 Va. 537, 543, 357 S.E.2d 534, 538 (1987)*; *Mann v. Clowser, 190 Va. 887, 903–04, 59 S.E.2d 78, 85–86 (1950).*

The test is the nature of the motivation that induced the promisee to make the contract. If his primary interest was the value of the result performance would have produced, then the "value" formula is applicable; if performance itself was his primary interest, then the "cost" formula is applicable. *Appalachian Power Co., 214 Va. at 535–36, 201 S.E.2d at 767.*

Where a buyer continued to live in his defectively constructed mobile home, the court held that he could rest his claim for damages on evidence the house was worthless in that the value of its use was de minimis. *Twin Lakes Mfg. Co. v. Coffey, 222 Va. 467, 475, 281 S.E.2d 864, 868 (1981).*

***Loss of Profit***

The rule governing recovery for loss of profits follows the general rule for recovery of damages. If the plaintiff can show that loss of profits was the natural result of the breach of the contract, and if he can show the extent of the damages with reasonable certainty, then he can recover damages for loss of profits. *Shenandoah Milling Co., 161 Va. at 649, 171 S.E. at 683; E.I. du Pont de Nemours & Co., 191 Va. at 568–69, 62 S.E.2d at 253; Commercial Bus. Sys., 249 Va. at 49–50, 453 S.E.2d at 268–69.*

Records of a business that has flourished in the past may be used in determining loss of profits. *Krikorian v. Dailey, 171 Va. 16, 30, 197 S.E. 442, 448 (1938).* Va. Code Ann. § 8.01-221.1 allows recovery of lost profits upon "proper proof" even if the business does not have a history of profits. This statute changes the common law, which provides that when the business involved is new and unestablished or one planned for the future, the anticipated profits from such a business cannot be recovered because of the uncertainty that the business would have flourished and yielded profits. *Kay Adv. Co. v. Olde London Transp. Co., 216 Va. 273, 275, 217 S.E.2d 876, 878 (1975).* The Supreme Court held before the enactment of Va. Code Ann. § 8.01-221.1 that such a business is a speculative venture, and too many contingencies exist to furnish a safeguard in fixing the measure of damages. *Mullen v. Brantley, 213 Va. 765, 769, 195 S.E.2d 696, 700 (1973).* But see *Commercial Bus. Sys., 249 Va. at 50, 453 S.E.2d at 268–69.*

The amount recoverable for loss of profits is the gross amount receivable under the contract less the cost of performing. *Adams, Payne & Gleaves, Inc. v. Indiana Wood Preserving Co., 155 Va. 18, 30, 154 S.E. 558, 562 (1930).*

If a business seeks to recoup lost overhead, it is required to show that it was reasonably unable to recoup those overhead costs. *Lockheed Info. Mgmt. Sys. Co.*

*v. Maximus, Inc., 259 Va. 92, 115–16, 524 S.E.2d 420, 433 (2000).*

☞ ***PRACTICE POINTER:*** The rule concerning loss of profits when a vendor fails to convey title is set forth in *Matthews, 144 Va. at 804–07, 130 S.E. at 790–91.*

***Unjust Enrichment***

Where one party has in his hands the money of another party that he ought to refund, the law conclusively presumes a promise to refund the money. *Robertson v. Robertson, 137 Va. 378, 381, 119 S.E. 140, 140 (1923).*

To defeat a recovery after receipt of an unjust enrichment, the circumstances must be such that it would be unfair to require restitution. *Central Nat'l Bank v. First & Merchants Nat'l Bank, 171 Va. 289, 312, 198 S.E. 883, 892–93 (1938).* A change of circumstances occasioned only by receipt of the enrichment will not suffice to allow retention of the sum. If, however, the property is lost or destroyed through no fault of the recipient of the money or property, he may not be required to refund it. *Id.*

This rule of implied promise of restitution also applies if money or property has been fraudulently obtained. *Culpeper Nat'l Bank v. Tidewater Improvement Co., 119 Va. 73, 80, 89 S.E. 118, 120 (1916).* It applies, too, where money has been paid when it was not legally due. *Moseley v. Boush, 25 Va. (4 Rand.) 392, 395 (1826).*

Unsolicited goods sent as an offer for sale are deemed unconditional gifts to the recipient. Va. Code Ann. § 11-2.2. Mailed goods unordered by the recipient must have been appropriated by the recipient to his own use before suit may be maintained. Va. Code Ann. § 11-2.1.

The Supreme Court of Virginia has adopted a three-part test to govern unjust enrichment claims: (1) the plaintiff must have conferred a benefit on the defendant; (2) the defendant must have known of the benefit and should reasonably have expected to repay the plaintiff; (3) the defendant must have accepted or retained the benefit without paying for its value. *James G. Davis Constr. Corp. v. FTJ, Inc., 298 Va. 582, 841 S.E.2d 642, 650 (2020).* Although the existence of an express contract covering the same subject matter of the parties' dispute normally precludes a claim for unjust enrichment, the Supreme Court has rejected the broad statement that there can be no unjust enrichment in contract cases, and has instead recognized a claim for unjust enrichment when that claim falls outside of the plain terms of the parties' express agreement. *Id. at 647–48.*

In *T. Musgrove Constr. Co., Inc. v. Young, 298 Va. 480, ___, 840 S.E.2d 337, 340 (2020)*, the Supreme Court of Virginia discussed the relationship between quantum meruit and unjust enrichment. See Practice Commentary to Instruction No. 45.570.

***Attorney-Client Contingent Fee Contracts***

Attorney-client contingent fee contracts involve a special rule. On improper discharge by the client, the attorney is only entitled to a fee based upon quantum meruit. *Hughes v. Cole, 251 Va. 3, 23, 465 S.E.2d 820, 833 (1996)*; *Fary v. Aquino, 218 Va. 889, 891, 241 S.E.2d 799, 800 (1978)*; *Heinzman v. Fine, Fine, Legum &*

*Fine, 217 Va. 958, 964, 234 S.E.2d 282, 286 (1977).*

***ALERTS:***

- Use the bracketed phrase only when prevention of gains is claimed as part of damages suffered.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.510
## Damages: Reasonable Proof

**The burden is on the plaintiff to prove by the greater weight of the evidence that he sustained** [damages; each item of damage he claims]**. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of** [them; each item]**. If the plaintiff fails to do so, then he cannot recover** [for that item]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Isle of Wight County v. Nogiec, 281 Va. 140, 147, 704 S.E.2d 83, 85–86 (2011)*; *Clark v. Scott, 258 Va. 296, 303, 520 S.E.2d 366, 370 (1999)*; *Commercial Bus. Sys. v. Bellsouth Servs., 249 Va. 39, 49–50, 453 S.E.2d 261, 268 (1995)*; *TechDyn Sys. v. Whittaker Corp., 245 Va. 291, 298, 427 S.E.2d 334, 339 (1993)*; *ADC Fairways Corp. v. Johnmark Constr., Inc., 231 Va. 312, 318, 343 S.E.2d 90, 93 (1986)*; *Thomas P. Harkins, Inc. v. Reynolds Assocs., 221 Va. 1128, 1131–32, 277 S.E.2d 222, 224 (1981)*; *Holz v. Coates Motor Co., 206 Va. 894, 897, 147 S.E.2d 152, 155 (1966)*; *Gertler v. Bowling, 202 Va. 213, 215, 116 S.E.2d 268, 270 (1960)*; *Washington Golf & Country Club, Inc. v. Briggs & Brennan Developers, Inc., 198 Va. 586, 592, 95 S.E.2d 233, 237–38 (1956)*; *Gwaltney v. Reed, 196 Va. 505, 507–08, 84 S.E.2d 501, 502 (1954)*; *White Sewing Mach. Co. v. Gilmore Furn. Co., 128 Va. 630, 650–51, 105 S.E. 134, 141 (1920)*.

### PRACTICE COMMENTARY

It is the function of a jury to determine whether and to what extent a plaintiff has been damaged. A plaintiff is not required to prove the amount of his damages with mathematical precision; he is required only to produce sufficient facts and circumstances that will permit a jury to make an intelligent and reasonable estimate of the amount. *Commercial Bus. Sys., 249 Va. at 49–50, 453 S.E.2d at 268.*

It has been held that, where an expert witness discounted his estimates of damage from a current date to an earlier date by an average of nine per cent per annum, this could provide a reasonable basis to permit the jury to make an intelligent estimate of the damages. *Harkins, 221 Va. at 1131, 227 S.E.2d at 224.*

"Where there is evidence of damage from several causes, for a portion of which a defendant cannot be held liable, a plaintiff must present evidence that will show within a reasonable degree of certainty the share of damages for which that defendant is responsible." *TechDyn Sys., 245 Va. at 296, 427 S.E.2d at 337.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.520**
**Damages: Nominal**

**Where only a breach of contract and no actual damage has been proved, nominal damages may be recovered.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Orebaugh v. Antonious, 190 Va. 829, 834, 58 S.E.2d 873, 875 (1950)*; *News Leader Co. v. Kocen, 173 Va. 95, 107–08, 3 S.E.2d 385, 390–91 (1939)*; *Wessel, Duval & Co. v. Winborne & Co., 125 Va. 502, 509, 99 S.E. 719, 720 (1919)*; *Building, Light & Water Co. v. Fray, 96 Va. 559, 566, 32 S.E. 58, 61 (1899)*.

### PRACTICE COMMENTARY

Upon the breach of a valid and binding contract the law infers nominal damages. However, the law does not infer or presume substantial or compensatory damages. The latter must be proven by competent evidence. *Orebaugh, 190 Va. at 834, 58 S.E.2d at 875*.

Whenever a party has violated the rights of another, the party whose rights have been violated has a cause of action against the other for damages. But, if no actual loss has occurred or no proof is given of the amount of the loss, only nominal damages can be recovered. *News Leader Co., 173 Va. at 107–08, 3 S.E.2d at 390–91*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.530**
**Damages: Consequential**

**Consequential damages are damages resulting from the breach of the contract that arise from special circumstances actually foreseen or reasonably foreseeable by the parties when they made the contract. If you find your verdict in favor of the plaintiff, you may award him such damages as you believe by the greater weight of the evidence he sustained as a result of the breach.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 8.2-715 (contracts under the UCC).

**CASE AUTHORITY:** *Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., 267 Va. 642, 654, 595 S.E.2d 1, 7 (2004)*; *Blue Stone Land Co. v. Neff, 259 Va. 273, 277–78, 526 S.E.2d 517, 518–19 (2000)*; *Long v. Abbruzzetti, 254 Va. 122, 126–27, 487 S.E.2d 217, 219 (1997)*; *Richmond Med. Supply Co. v. Clifton, 235 Va. 584, 586–87, 369 S.E.2d 407, 409 (1988)*; *Danburg v. Keil, 235 Va. 71, 76, 365 S.E.2d 754, 757 (1988)*; *Chesapeake & Potomac Tel. v. Sisson & Ryan, Inc., 234 Va. 492, 505, 362 S.E.2d 723, 731 (1987)*; *Fairfax County Redev. & Hous. Auth. v. Hurst & Assocs. Consulting Eng'rs, Inc., 231 Va. 164, 167, 343 S.E.2d 294, 296 (1986)*; *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 801, 214 S.E.2d 155, 160 (1975)*; *Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp., 195 Va. 827, 836, 80 S.E.2d 574, 580 (1954)*; *Washington & Old Dominion Ry. Co. v. Westinghouse Electric & Mfg. Co., 120 Va. 620, 627, 89 S.E. 131, 133 (1916), modified on reh'g, 120 Va. 620, 636–37, 91 S.E. 646, 648 (1917).*

## PRACTICE COMMENTARY

A party may recover both damages which are "direct" and those which are "consequential." Direct damages are those which, in the ordinary course of human experience, can be expected to result naturally from a breach. Consequential damages do not flow directly from a breach but arise because of special circumstances which are not ordinarily predictable. *Roanoke Hosp. Ass'n, 215 Va. at 801, 214 S.E.2d at 160.* For example, interest costs incurred from delay in construction are predictable and therefore are direct damages, but increases in interest rates are special circumstances giving rise to consequential damages only if the parties contemplated them at the time of contracting. *Id. at 802–03, 214 S.E.2d at 160–61.*

Consequential damages may be awarded only if the parties knew at the time of contracting of the possibility that special circumstances might give rise to consequential damages. *Va. Polytechnic Inst. & State Univ., 267 Va. at 654, 595 S.E.2d at 7*; Va. Code Ann. § 8.2-715(2)(a).

☞ ***PRACTICE POINTER:*** An agreement made to exempt the defendant from consequential damages is valid. *Envirotech Corp. v. Halco Eng'g, 234 Va. 583, 593–94, 364 S.E.2d 215, 220 (1988)*; *Washington & Old Dominion Ry., 120 Va. at 627, 89 S.E. at 133.*

## ***ALERTS:***

- Whether damages are direct or consequential is a question of law. This instruction should only be given when the court has decided that the damages claimed are consequential in nature. Whether special circumstances were within the contemplation of the parties to justify the recovery of consequential damages is generally a question of fact for the jury. *Richmond Med. Supply Co., 235 Va. at 586–87, 369 S.E.2d at 409.* The instruction allows the jury to decide whether the damages were within the contemplation of the parties.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.540**
**Damages: Liquidated**

**The parties in this case provided for the possibility of breach of contract by fixing an amount to be paid to the injured party in the event of a breach. If you find your verdict for the plaintiff, then you shall award him this fixed amount as provided in the contract.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 8.2-718 (contracts under the UCC).

**Case Authority:** *Boots, Inc. v. Singh, 274 Va. 513, 517, 649 S.E.2d 695, 697 (2007)*; *Gordonsville Energy, L.P. v. Virginia Elec. & Power Co., 257 Va. 344, 355, 512 S.E.2d 811, 818 (1999)*; *O'Brian v. Langley School, 256 Va. 547, 550–51, 507 S.E.2d 363, 365 (1998)*; *Brooks v. Bankson, 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994)*; *301 Dahlgren Ltd. Partnership v. Bd. of Supervisors of King George County, 240 Va. 200, 202–03, 396 S.E.2d 651, 653 (1990)*; *Taylor v. Sanders, 233 Va. 73, 75, 353 S.E.2d 745, 746–47 (1987)*; *Pettibone Wood Mfg. Co. v. Pioneer Constr. Co., 203 Va. 152, 160, 122 S.E.2d 885, 891 (1961)*; *United Cigarette Mach. Co. v. Brown, 119 Va. 813, 827–28, 89 S.E. 850, 855–56 (1916)*; *Crawford v. Heatwole & Hedrick, 110 Va. 358, 359–60, 66 S.E. 46, 47 (1909)*; *Stony Creek Lumber Co. v. Fields & Co., 102 Va. 1, 3, 45 S.E. 797, 797 (1903)*; *Welch v. McDonald, 85 Va. 500, 505, 8 S.E. 711, 713 (1888)*.

## Practice Commentary

Liquidated damages are fixed in advance by parties to a contract at the time the contract is formed. *O'Brian, 256 Va. at 551, 507 S.E.2d at 365*. Parties entering into an agreement may legitimately seek to avoid any question of damages for breach of contract arising in the future by agreeing in advance upon a definite sum to be paid by the party breaching the contract.

If the parties to a contract have agreed to liquidated damages in advance of any breach, the party breaching the contract is not responsible for damages greater than the liquidated damages agreed upon, regardless of what the actual damages may be. *Welch, 85 Va. at 505, 8 S.E. at 713*. Although liquidated damages must be ascertainable by calculation or computation, there is no requirement that they necessarily be determinable at the time the contract is made. The liquidated damages provision may depend upon outside circumstances or specific conditions which may not come into being until after the contract is signed or breached. In such circumstances, however, any amount specified within the contract may not be unreasonably out of proportion to the probable damage which might result from a breach. *Crawford, 110 Va. at 360–61, 66 S.E. at 47–48*.

The principle behind liquidated damages is compensation. Any intention of the parties to provide liquidated damages for breach of contract will be disregarded where the principle of compensation has been disregarded. *Detroit Edison Co. v. Wyatt Coal Inc., 1 F.2d 788, 789 (4th Cir. 1924)*. Whether an agreed upon sum constitutes liquidated damages or a penalty depends upon the facts of each case. Generally, the sum agreed upon will be regarded as liquidated damages if the anticipated damages would have been uncertain or difficult to prove. *Boots, Inc., 274 Va. at 516–18, 649 S.E.2d at 697–98*; *O'Brian, 256 Va. at 551, 507 S.E.2d at 365*. The sum will be regarded as a penalty if it would have been possible to determine the actual damages without difficulty, or where the stipulated amount would have been grossly in excess of actual damages. *Id. at 517, 649 S.E.2d at 697*.

For a discussion of liquidated damages provisions in contracts governed by Va. Code Ann. § 2.2-4335(B) (prohibiting public construction contract provisions that bar damages for unreasonable delays), see *Martin Bros., 277 Va. 586, 675 S.E.2d 183.*

***ALERTS:***

- Damages referred to in a contract as "liquidated damages" may not be recovered if they are really a penalty. *O'Brian, 256 Va. at 551, 507 S.E.2d at 365.* Whether they are a penalty or liquidated damages is a question of law. If they are liquidated damages, whether they should be recovered is a question of fact.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.550
## Damages: Duty to Mitigate

**The plaintiff had a duty to minimize his damages. If you find that the plaintiff did not act reasonably to minimize his damages and, as a result, they were greater than if he had acted to minimize them, then he cannot recover the amount by which they were increased. The duty to minimize damages begins when the plaintiff knew, or should have known, of the breach of the contract.**

**The burden is on the defendant to prove by the greater weight of the evidence that the plaintiff failed to minimize his damages and to prove by the greater weight of the evidence the amount by which they were increased as a result.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Forbes v. Rapp, 269 Va. 374, 380, 611 S.E.2d 592, 595–96 (2005 Fox-Sadler Co. v. Earl E. Norris Roofing Co., 229 Va. 106, 111–12, 327 S.E.2d 95, 98 (1985); Rosenberg v. Stone, 160 Va. 381, 386–87, 168 S.E. 436, 437 (1933); Hannan v. Dusch, 154 Va. 356, 377, 153 S.E. 824, 831 (1930); Clinchfield Coal Corp. v. Hayter, 130 Va. 711, 719, 108 S.E. 854, 857 (1921); City of Richmond v. Cheatwood, 130 Va. 76, 87–88, 107 S.E. 830, 834 (1921).*

### PRACTICE COMMENTARY

The duty to minimize damages does not apply in all cases. It is required only when it can be performed with minor expense and with reasonable exertion. *Rosenberg, 160 Va. 386–87, 168 S.E. at 437–38.* For a case evaluating whether there was sufficient evidence to give a mitigation of damages instruction, see *Monahan v. Obici Med. Mgmt. Servs., 271 Va. 621, 628 S.E.2d 330 (2006).*

Mitigation of damages is not required to be specifically pled before a defendant may assert it, provided the issue has been otherwise shown by the evidence. This holding is limited solely to mitigation of damages as an affirmative defense. *Monahan, 271 Va. at 634, 628 S.E.2d at 337.*

See also Instruction No. 9.020, Duty to Mitigate Damages.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

**Instruction No. 45.560**
**Buyer's Damages: Breach of Contract to Sell Property**

**The measure of** (name of buyer)**'s damages is the value of the property at the time the contract was breached minus the contract price.** (Name of buyer) **must prove his damages by the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Williams v. Snider, 190 Va. 226, 232, 56 S.E.2d 63, 66 (1949).*

### PRACTICE COMMENTARY

In addition to considering the market price of the property in question, the jury may also consider any other valid contract to sell the same property to another person at an increased price.

☞ ***PRACTICE POINTER:*** For the definition of greater weight of the evidence, see Instruction No. 3.100.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

## Instruction No. 45.570
## Quantum Meruit

**When a contract to pay for** [services rendered; labor and materials] **has been implied, the defendant must pay the reasonable value of the** [services rendered; labor and materials supplied]**. You may consider the nature of the work and the customary rate of pay. The plaintiff must prove the reasonable value of the** [services; labor and materials] **by the greater weight of the evidence.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Mongold v. Woods, 278 Va. 196, 205, 677 S.E.2d 288, 293 (2009)*; *Virginia Fin. Assocs., Inc. v. ITT Hartford Group, Inc., 266 Va. 177, 183, 585 S.E.2d 789, 792 (2003)*; *Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998)*; *Hughes v. Cole, 251 Va. 3, 25, 465 S.E.2d 820, 834 (1996)*; *Wood v. Carwile, 231 Va. 320, 324, 343 S.E.2d 346, 348 (1986)*; *Marine Dev. Corp. v. Rodak, 225 Va. 137, 144, 300 S.E.2d 763, 767 (1983)*; *Ricks v. Sumler, 179 Va. 571, 577, 19 S.E.2d 889, 891 (1942)*; *Campbell County v. Howard, 133 Va. 19, 49, 112 S.E. 876, 884–85 (1922)*; *Rea v. Trotter & Bro., 67 Va. (26 Gratt.) 585, 592–93 (1875).*

## Practice Commentary

In *T. Musgrove Constr. Co., Inc. v. Young, 298 Va. 480, 840 S.E.2d 337, 340 (2020)*, the Supreme Court of Virginia "disentangle[d] the two theories" of quantum meruit and unjust enrichment, "which can easily be conflated," noting that "there has been considerable confusion between the terms 'quantum meruit' and 'unjust enrichment.' " The measure of recovery for quantum meruit for a contract implied in fact is the reasonable value of the services provided, while the measure of recovery for unjust enrichment is limited to the benefit realized and retained by the defendant. *Id. at 341.* Thus, the measure of damages is not necessarily the same for the two.

A plaintiff can seek recovery in quantum meruit when the work was done at the instance and request of another. For example, quantum meruit is available when (1) the parties contract for work to be done, but the parties did not agree on a price, (2) the compensation mentioned is too indefinite, (3) there is a misunderstanding as to the price to be paid; or (4) in some instances, the contract is void and of no effect. *Id.*

Where the defendant did not request the plaintiff's services, "a cause of action for quantum meruit, i.e., for a contract implied in fact, does not apply. Instead, the well-established doctrines for unjust enrichment provide the rule of decision." *Id.*

"The measure of recovery is the reasonable value of the services performed, and not the amount of benefit which actually accrued from them to him for whom they were performed." *Marine Dev. Corp., 225 Va. at 144, 300 S.E.2d at 767*; *Hendrickson v. Meredith, 161 Va. 193, 202, 170 S.E. 602, 605 (1933).*

In determining the reasonable value of an attorney's legal services, the client's net worth may be relevant to the character and importance of the matter in which the services were rendered or the value of property to be affected by such services. *Wood, 231 Va. at 323–26, 343 S.E.2d at 348–49.* See Instruction No. 42.060, Wrongfully Discharged Attorney Entitled to Quantum Meruit.

☞ ***Practice Pointer:*** For the definition of greater weight of the evidence, see

Instruction No. 3.100.

***ALERTS:***

- It is error to instruct the jury on a quantum meruit theory when the case has been brought and tried for breach of an express contract and not for the reasonable value of work done under an implied contract. *Ted Lansing Supply Co. v. Royal Alum. & Constr. Corp., 221 Va. 1139, 1141–42, 277 S.E.2d 228, 229–30 (1981)* (a case involving breach of express warranty versus breach of implied warranty).

- Municipal corporations are immune from quantum meruit claims when exercising governmental functions, but not when performing proprietary functions. *Jean Moreau & Assocs. v. Health Ctr. Comm'n, 283 Va. 128, 140, 720 S.E.2d 105, 112 (2012).*

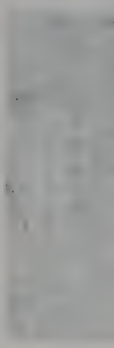
***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140



**Instruction No. 45.600**
**Finding Instruction**

**You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:**

**(1) there was a contract between the parties; and**

**(2) the defendant breached the contract.**

**You shall find your verdict for the defendant if:**

**(1) the plaintiff failed to prove** [either or both; any and all] **of the elements above; or if**

**(2) the defendant has proved by the greater weight of the evidence that it was impossible to perform the contract.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Green v. Goodman-Gable-Gould Co., 268 Va. 102, 108, 597 S.E.2d 77, 81 (2004); Shenandoah Milling Co. v. Phosphate Prods. Corp., 161 Va. 642, 650, 171 S.E. 681, 684 (1933).*

### PRACTICE COMMENTARY

This is a sample instruction for a case in which the existence of a contract, its breach, and the defense of impossibility to perform the contract have all been raised. The instruction should be modified to exclude or to include all issues and defenses as may be applicable to a particular case.

Instruction No. 45.000, Issues and Burdens of Proof, corresponds to this finding instruction.

For the definition of greater weight of the evidence, see Instruction No. 3.100. See Instruction No. 3.110, Definition of Clear and Convincing Evidence, if that standard of proof is applicable to one or more issues included in the finding instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

MICHIE'S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, *"Contracts"* and *"Implied Contracts"* (2004).

## Instruction No. 45.610
## Finding Instruction: Third-Party Case

**You should first reach a verdict in the case of** (name of plaintiff) **against** (name of defendant)**. You shall find your verdict for** (name of plaintiff) **if he has proved by the greater weight of the evidence that:**

**(1) There was a contract between** (name of plaintiff) **and** (name of defendant)**; and**

**(2)** (Name of defendant) **breached the contract with** (name of plaintiff)**.**

**You shall find your verdict for** (name of defendant) **if:**

**(1)** (Name of plaintiff) **failed to prove either or both of the two elements above.**

**If, in the case of** (name of plaintiff) **against** (name of defendant) **you find for** (name of plaintiff) **against** (name of defendant)**, then you must reach a verdict in the case of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**. You shall find your verdict for the** (name of defendant, third-party plaintiff) **if he has proved by the greater weight of the evidence that:**

**(1)** (Name of third-party defendant) **breached a contract with** (name of third-party plaintiff) **under which** (name of third-party defendant) **had a duty to perform for** (name of third-party plaintiff) **an act or acts for** (name of plaintiff)**; and**

**(2)** (Name of third-party defendant)**'s breach of such contract was the cause of all or part of the damages awarded to** (name of plaintiff) **against** (name of defendant, third-party plaintiff)**.**

**You shall find your verdict for** (name of third-party defendant) **if:**

**(1)** (Name of defendant, third-party plaintiff) **failed to prove either or both of the two elements above.**

**If, in the case of** (name of plaintiff) **against** (name of defendant), **you find for** (name of defendant)**, then you do not need to consider a verdict in the third-party claim of** (name of defendant, third-party plaintiff) **against** (name of third-party defendant)**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

This instruction would apply only to a contract case involving a single third-party claim, and without other complicating factors. The same format can be used to include other such factors.

This instruction would apply to a situation where the defendant, third-party plaintiff has a contract with the third-party defendant to perform all or part of the contractual obligation of the defendant to the plaintiff. It can be adapted to cover third-party claims which arise in other ways.

For the definition of greater weight of the evidence, see Instruction No. 3.100. Instruction No. 45.005, Issues and Allocations of Burden of Proof: Third-Party Case corresponds to this finding instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapter 24

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 2.3

Kent Sinclair, VIRGINIA REMEDIES, Chapters 36, 38, 40

MICHIE'S JURISPRUDENCE, Contracts §§ 1 through 140

# Chapter 46

# EMINENT DOMAIN

## Scope Note

**Instruction No. 46.000** Scope of Jurors' Duties
**Instruction No. 46.010** Just Compensation: No Damage to Residue
**Instruction No. 46.020** Just Compensation: Damage to Residue and No Enhancement
**Instruction No. 46.030** Just Compensation: Damage to Residue and Enhancement
**Instruction No. 46.040** Just Compensation: Date of Determination
**Instruction No. 46.050** Fair Market Value
**Instruction No. 46.060** Fair Market Value: Use of Property
**Instruction No. 46.070** Damage to Residue
**Instruction No. 46.080** Lost Access
**Instruction No. 46.085** Lost Profits
**Instruction No. 46.090** Effect of Enhancement on Damage to Residue
**Instruction No. 46.100** Damage to Residue: Formula for Determining
**Instruction No. 46.110** Weight of Evidence—Value
**Instruction No. 46.120** Landowner's Duty to Mitigate Damages
**Instruction No. 46.130** "Quotient" Award Not Permitted
**Instruction No. 46.140** Majority Award Permitted
**Instruction No. 46.150** Highway Condemnation: Definition of Limited Access Highway
**Instruction No. 46.160** [RESERVED]
**Instruction No. 46.170** [RESERVED]
**Instruction No. 46.180** Elements of Report

# SCOPE NOTE

The Instructions in this chapter cover proceedings under Title 25.1 and Title 33.2 to determine the just compensation to be paid to an owner whose property has been condemned under the authority of the Commonwealth or a state agency. Title 25.1 is the general procedural statute that governs all condemnations unless another procedure is specifically provided for by law. These instructions will need to be modified for condemnations under other statutes. Authority to exercise the power of eminent domain must be expressly granted by statute. Grants to various agencies and private corporations are scattered throughout the Code; some are found in uncodified acts and charters.

Article I, Section 11 of the Constitution of Virginia ensures a landowner's constitutional right to compensation in a common law action based on implied contract, both when the property is taken for public use and when it is damaged for public use. A determination regarding compensation may be initiated by a declaratory judgment proceeding under Va. Code Ann. § 8.01-187, but a proceeding under that statute does not provide the exclusive remedy for a landowner making an inverse condemnation claim. *Kitchen v. City of Newport News, 275 Va. 378, 395, 657 S.E.2d 132, 141 (2008).* The provisions of Article I, Section 11, are "self-executing," and the enactment of Va. Code Ann. § 8.01-187 does not limit the right to make a constitutional takings claim. *Kitchen, 275 Va. at 395, 657 S.E.2d at 141–42*; *Jenkins v. County of Shenandoah, 246 Va. 467, 469–70, 436 S.E.2d 607, 609 (1993).*

Having made a bona fide, but ineffectual, effort to purchase the property, the condemnor must file a petition describing the property and alleging, among other things, its authority, the public use to be made of the property, and the necessity for the condemnation. Va. Code Ann. § 25.1-206. Then, the issue of just compensation is determined by commissioners or by jurors, upon an election made by the owner. If the owner fails to make the election, then, upon motion of the petitioner, the court may determine the issue of just compensation. Va. Code Ann. § 25.1-220.

The qualifications and empanelment procedures for commissioners are set forth in Va. Code Ann. §§ 25.1-227.1 and 25.1-227.2. The qualifications and selection procedure for jurors are set forth in Va. Code Ann. §§ 25.1-228 and 25.1-229.

The sole issue to be determined by the jury is just compensation. There is no constitutional or statutory authority for a jury trial on a plea in bar regarding issues of public use or necessity. *Hoffman Family, L.L.C. v. City of Alexandria, 272 Va. 274, 282, 634 S.E.2d 722, 726 (2006).* In 2018, Va. Code Ann. § 25.1-230 was amended to provide that, "[i]n determining the market value of the property before the taking, the body determining just compensation may consider everything a buyer and seller in the marketplace would reasonably consider, but may not consider any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired, or by the likelihood that the property would be acquired for such public use, other than that due to physical deterioration within the reasonable control of the owner."

Following a declaratory judgment proceeding in which it has been determined that a person's property has been taken or damaged, the person, under certain circumstances, may request a determination of just compensation pursuant to the provisions of Va.

Code Ann. § 8.01-187. These instructions are appropriate for such determinations subject to the discussion below.

When an entire property is allegedly damaged, the rule that governs the recovery of damages is different from that which governs in the case of damage to the remainder of a single parcel. In such a case, damages are recoverable only upon a threshold showing of loss in market value, determined *after* the taking rather than at the time of the taking. These instructions will need to be modified to reflect the different time at which loss in market value is determined. *Shirley v. Russell, 149 Va. 658, 679–82, 140 S.E. 816, 822–23 (1927)*; *Town of Galax v. Waugh, 143 Va. 213, 238–41, 129 S.E. 504, 511–12 (1925).*

The "unity of use" test is the primary method to determine whether otherwise independent parcels of land, owned by the same entity, are deemed to be a single parcel for the purposes of eminent domain. The question to ask is whether one piece of land is necessary to the most advantageous use of the other piece. *Virginia Elec. & Power Co. v. Webb, 196 Va. 555, 566, 84 S.E.2d 735, 741 (1954).* Where intervention or joinder is allowed and the condemnor raises the issue of unity of use, this point must be proved and appropriate instructions given. *Webb, 196 Va. at 566–67, 84 S.E.2d at 742.* For the unity of use doctrine to apply, the tracts must be owned by the same entity. *Bogese, Inc. v. State Highway and Transp. Comm'r, 250 Va. 226, 229–31, 462 S.E.2d 345, 347–48 (1995).* See also *Commonwealth Transp. Comm'r of Va. v. Glass, 270 Va. 138, 147–48, 613 S.E.2d 411, 416–17 (2005).*

In a condemnation proceeding, the Commonwealth does not have the right to either take a nonsuit or dismiss the proceedings if it has acquired or possessed the property. *Trout v. Commonwealth Transp. Comm'r, 241 Va. 69, 73–75, 400 S.E.2d 172, 173–75 (1991).*

Va. Code Ann. § 25.1-100, as amended, and Va. Code Ann. § 25.1-230.1 provide that any lost access and lost profits are included when determining just compensation.

Instruction No. 46.000 informs the jurors that their sole duty is to determine the issue of just compensation. Instruction Nos. 46.010, 46.020, and 46.030 are alternate statements of the elements of just compensation. Only one of them will be appropriate in any given case.

If an entire parcel of land is taken, or if there is no proof of damages to the residue, the only element of just compensation is fair market value and Instruction No. 46.010 applies. If part of a parcel of land has been taken, and if there is proof of damage to the remaining portion, either Instruction No. 46.020 or No. 46.030 applies.

In condemnation actions not brought under Chapter 3 of Title 25.1 (Va. Code Ann. § 25.1-300 et seq.) or Va. Code Ann. §§ 33.2-1018–33.2-1029, the body determining just compensation shall ascertain the value of the property taken and the damages, if any, to the remaining property beyond the peculiar benefits, if any, to the remaining property by reason of the taking and use by the petitioner, and these instructions should be amended accordingly. Va. Code Ann. § 25.1-230(A)(2).

In all cases, Instruction No. 46.040 must be given to inform the jury of the date as of which just compensation is to be determined.

Fair market value is the fundamental concept of just compensation determinations. Instruction No. 46.050 sets out the willing buyer-willing seller test of fair market value.

Instruction No. 46.060 informs the jurors that fair market value is determined by the highest and best probable use of the property and not just its use at the time of taking.

The issue of damage to remaining property is covered by Instruction Nos. 46.070, 46.090, 46.100, and 46.120. Instruction No. 46.070 states that the measure of damage is the decline in fair market value as determined in light of reasonably foreseeable circumstances. See generally, *Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 526 S.E.2d 4 (2000)*; *Dressler v. City of Covington, 208 Va. 520, 158 S.E.2d 660 (1968)*. Individual items of damage are relevant to this determination only insofar as they affect market value, but consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of land. *Board of County Supervisors v. Wilkerson, 226 Va. 84, 89, 307 S.E.2d 450, 453 (1983)*. The owner bears the burden of proving his damages to the residue of his property. *Rocky Mount v. Hudson, 244 Va. 271, 273, 421 S.E.2d 407, 408 (1992)*. Instruction No. 46.120 specifies that reasonable adjustment expenses should be considered. Instruction No. 46.100 provides a formula to use to determine damages.

Instruction No. 46.080 deals with the material impairment of direct access to property, a portion of which has been taken or damaged.

Instruction No. 46.090 should be used only in conjunction with Instruction No. 46.030. It tells the jurors that, if they find that the value of the owner's remaining property has been enhanced by the taking, then they should deduct the amount of enhancement from any award of damages to the residue.

Instruction Nos. 46.110, 46.130, 46.140 and 46.180 apply in all cases. Instruction No. 46.110 informs the jurors that they are not bound by the testimony of the experts or the owner as to values. But with respect to the testimony of the landowner, see *West v. Anderson, 186 Va. 554, 564–66, 42 S.E.2d 876, 880–82 (1947)*, and *Colonial Pipeline v. Lohman, 207 Va. 775, 780, 152 S.E.2d 34, 38 (1967)*. Instruction No. 46.130 forbids the use of the quotient method in arriving at an award. Instruction No. 46.140 states that majority and minority reports may be filed. Instruction No. 46.180 describes what the jurors' report must include.

The condemnation statutes were significantly amended in 2013. Most cases cited in the Sources & Authority statements in this chapter were decided under prior law.

The application of concepts of compensatory damages and mitigation of damages are unique in condemnation cases. For a general discussion of these principles outside the context of eminent domain in Virginia, see Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice §§ 23.03 & 23.04.

## Instruction No. 46.000
## Scope of Jurors' Duties

**The Commonwealth is empowered by law to condemn all the property described in the petition in this case. Your only duty is to determine the amount of just compensation to be paid to the property owner. You may not question the wisdom or necessity for the condemnation or the amount of property sought by the Commonwealth, and you may not alter the plans of the Commonwealth in any way.**

## Sources & Authority

**Governing Statutes:** U.S. Const. Amend. V; Va. Const. art. I, § 11; Va. Code Ann. §§ 1-219.1, 15.2-1901–15.2-1907.1, 25.1-101, 25.1-230, 33.2-1018–33.2-1029, 36-27, 36-49.

**Case Authority:** *Hoffman Family, LLC v. City of Alexandria, 272 Va. 274, 282–83, 634 S.E.2d 722, 726–27 (2006)*; *Hamer v. School Bd. of Chesapeake, 240 Va. 66, 70–71, 393 S.E.2d 623, 625–26 (1990)*; *Stewart v. Fugate, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972)*; *Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 368, 137 S.E. 458, 462 (1927)*; *State Highway Comm'r v. Kreger, 128 Va. 203, 226–27, 105 S.E. 217, 224–25 (1920)*; *Zircle v. Southern Ry., 102 Va. 17, 20–21, 45 S.E. 802, 804 (1903)*.

### Practice Commentary

The power of eminent domain is an essential attribute of sovereignty that inheres in the General Assembly. The only constitutional limitations imposed upon this power are contained in the just compensation clause, Va. Const., art. I, § 11. Consequently, there is no constitutional right to a hearing on the issue of the necessity of the taking. *Hamer, 240 Va. at 70, 393 S.E.2d at 626*; *Hoffman, 272 Va. at 282, 634 S.E.2d at 726*. The legislature may delegate its power to political subdivisions, governmental bodies, and certain regulated private entities exercising functions charged with the public interest. Such a delegation does not, however, render the necessity for the exercise of the power by the delegate subject to judicial review unless the legislature, by statute, expressly so provides. *Stanpark Realty Corp. v. City of Norfolk, 199 Va. 716, 721–22, 101 S.E.2d 527, 531–32 (1958)*.

### *ALERTS:*

- Limitations on eminent domain are set forth in Va. Code Ann. § 1-219.1.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 27.22

Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure § 3.2

Kent Sinclair, Virginia Remedies §§ 3-3, 3-6

Michie's Jurisprudence, Eminent Domain §§ 1 through 103

## Instruction No. 46.010
## Just Compensation: No Damage to Residue

**To determine the just compensation to be paid, you must decide the fair market value of the property taken by the Commonwealth.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-230, 33.2-1018–33.2-1029.

**CASE AUTHORITY:** *Virginia Highlands Airport Auth. v. Singleton Auto Parts, Inc., 277 Va. 158, 169, 670 S.E.2d 734, 740 (2009); Gray & Gregory v. GTE South Inc., 261 Va. 67, 71, 540 S.E.2d 498, 500 (2001); Chappell v. Virginia Elec. & Power Co., 250 Va. 169, 172, 458 S.E.2d 282, 284 (1995); East Tenn. Nat. Gas Co. v. Riner, 239 Va. 94, 97, 100, 387 S.E.2d 476, 478–79 (1990); Transportation Comm'r v. DuVal, 238 Va. 679, 685–86, 385 S.E.2d 605, 608 (1989); Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 710, 187 S.E.2d 148, 152, 153 (1972); Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 472–74, 78 S.E.2d 677, 680 (1953); Long v. Shirley, 177 Va. 401, 410–12, 14 S.E.2d 375, 379–80 (1941).*

### PRACTICE COMMENTARY

This instruction and Instruction Nos. 46.020 and 46.030 are the three "Just Compensation" instructions. Only one of these three will be applicable in any given case. This instruction is used when there is no claim of damage to the residue.

This instruction should always be given with Instruction No. 46.040, Just Compensation: Date of Determination, and Instruction No. 46.050, Fair Market Value, in all cases.

Before jurors may consider the existence of mineral deposits as an element of market value, they must assess the four factors set out in *Riner, 239 Va. at 99, 387 S.E.2d at 479.*

☞ ***PRACTICE POINTER:*** Billboards are valued according to their fair market value as a component of the total compensation without regard to a tenant's leasehold interest. Va. Code Ann. § 25.1-234(C); *Lamar Corp. v. Commonwealth Transportation Comm'r, 262 Va. 375, 384–85, 552 S.E.2d 61, 65–66 (2001).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.020**
**Just Compensation: Damage to Residue and No Enhancement**

**To determine the just compensation to be paid, you must decide:**

**(1) the fair market value of the property taken by the Commonwealth; and**

**(2) the damage, if any, to the owner's remaining property as a result of the taking.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 25.1-230, 33.2-1018–33.2-1029.

**Case Authority:** *Byler v. Va. Elec. & Power Co., 284 Va. 501, 509, 731 S.E.2d 916, 921 (2012)*; *Livingston v. Va. DOT, 284 Va. 140, 155–57, 726 S.E.2d 264, 273–74 (2012)*; *City of Virginia Beach v. Oakes, 263 Va. 510, 516–17, 561 S.E.2d 726, 728–29 (2002)*; *Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 394–95, 526 S.E.2d 4, 8–9 (2000)*; *Chappell v. Virginia Elec. & Power Co., 250 Va. 169, 172–73, 458 S.E.2d 282, 284 (1995)*; *Town of Rocky Mount v. Hudson, 244 Va. 271, 273, 421 S.E.2d 407, 408 (1992)*; *Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972)*; *Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 472–73, 78 S.E.2d 677, 680 (1953)*; *Long v. Shirley, 177 Va. 401, 409–11, 14 S.E.2d 375, 378–79 (1941)*.

## Practice Commentary

This instruction and Instruction Nos. 40.010 and 40.030 are the three "Just Compensation" instructions. Only one of these will be applicable in any given case. This instruction is used when there is evidence of damage to the residue but no evidence of enhancement to the residue.

This instruction should be used with Instruction No. 46.040, Just Compensation: Date of Determination, Instruction No. 46.050, Fair Market Value, and Instruction No. 46.070, Damage to Residue.

A single act of flooding can support an inverse condemnation claim. *Livingston, 284 Va. at 152, 726 S.E.2d at 271*. An allegation of diminution in value arising from the public use of proximately located property (in this case construction and operation of an electrical transmission line) does not state a cause of action for inverse condemnation because "there must be some 'damage to the property itself.' " *Byler, 284 Va. at 509, 731 S.E.2d at 921*. In *Chappell, 250 Va. at 172–73, 458 S.E.2d at 284*, the Court affirmed the trial court's exclusion of evidence of public fear about the high voltage power lines on adjacent property and the effect of that fear on the market value of the property. The landowner produced no evidence of comparable sales consummated at prices allegedly diminished by public fear of electric transistor lines. *Id.* A landowner's expert must be qualified to testify to whether the value of the property can be diminished by "a perceived danger associated with the use of the land." *Kipps v. Va. Natural Gas, Inc., 247 Va. 162, 162, 441 S.E.2d 4, 5 (1994)*.

In 2018, Va. Code Ann. § 25.1-230 was amended to provide that, "[i]n determining the market value of the property before the taking, the body determining just compensation may consider everything a buyer and seller in the marketplace would reasonably consider, but may not consider any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired, or by the likelihood that the property would be acquired for such public use, other than that due to physical deterioration within

the reasonable control of the owner."

***ALERTS:***

- Va. Code Ann. § 25.1-100, as amended, and Va. Code Ann. § 25.1-230.1 provide that the determination of just compensation for damage to the residue shall include lost access and lost profits.

- Definitions of the terms "lost profits" or "lost access" in Va. Code Ann. § 25.1-100 do not create any new right or remedy or diminish any existing right or remedy other than to allow the jury to consider a change in access or lost profits in awarding just compensation.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.030**
**Just Compensation: Damage to Residue and Enhancement**

**To determine the just compensation to be paid you must decide:**

**(1) the fair market value of the property taken by the Commonwealth; and**

**(2) the damage, if any, to the owner's remaining property as a result of the taking beyond the enhancement, if any, which results from the taking.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-230, 33.2-1018–33.2-1029.

**CASE AUTHORITY:** *State Hwy. & Transp. Comm'r v. Dennison, 231 Va. 239, 244, 343 S.E.2d 324, 327–28 (1986)*; *State Highway Comm'r v. Allmond, 220 Va. 235, 239, 257 S.E.2d 832, 834–35 (1979)*; *Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972)*; *Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 472–73, 78 S.E.2d 677, 680 (1953)*; *Long v. Shirley, 177 Va. 401, 405–06 14 S.E.2d 375, 377 (1941).*

## PRACTICE COMMENTARY

This instruction and Instruction Nos. 46.010 and 46.020 are the three "Just Compensation" instructions. Only one of these will be applicable in any given case. This instruction is used when there is evidence of damage of the residue and evidence of enhancement to the residue.

This instruction should be given with Instruction No. 46.040, Just Compensation: Date of Determination, Instruction No. 46.050, Fair Market Value, Instruction No. 46.070, Damage to Residue, and Instruction No. 46.090, Effect of Enhancement.

## *ALERTS:*

- Effective January 1, 2013, Va. Code Ann. § 25.1-100 was amended and Va. Code Ann. § 25.1-230.1 was added with the result that the determination of just compensation for damage to the residue shall now include any lost access and lost profits.

- Definitions of the terms "lost profits" or "lost access" in Va. Code Ann. § 25.1-100 do not create any new right or remedy or diminish any existing right or remedy other than to allow the jury to consider a change in access or lost profits in awarding just compensation.

## *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.040**
**Just Compensation: Date of Determination**

**You must determine just compensation for the property owner as of** (date).

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 25.1-100.

**CASE AUTHORITY:** *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc., 272 Va. 2, 13, 630 S.E.2d 505, 511 (2006)*; *Bartz v. Board of Supervisors, 237 Va. 669, 674, 379 S.E.2d 356, 358–59 n.1 (1989).*

### PRACTICE COMMENTARY

Valuation is determined by the jury on either the date of a lawful taking or the date of the filing of a petition, whichever occurs first. Va. Code Ann. § 25.1-100 ("Date of Valuation"). The former can precede the latter only under the quick taking provisions of Va. Code Ann. §§ 25.1-100 et seq. or 33.2-1018 et seq.

In proceedings under the Housing Authorities Law, the court must instruct that compensation is to be determined as of the announcement of redevelopment plans if it finds there has been unreasonable delay in instituting proceedings. Va. Code Ann. § 36-27; *C & C Real Estate, Inc., 272 Va. at 13, 630 S.E.2d at 511*; *Pearsall v. Richmond Redev. & Hous. Auth., 218 Va. 892, 904, 242 S.E.2d 228, 235–36 (1978).*

☞ ***PRACTICE POINTER:*** A landowner is not entitled to interest while he maintains legal title to, control over, and use of the property. *Bartz, 237 Va. at 675–76, 379 S.E.2d at 359.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.050
## Fair Market Value

**The fair market value is the price that property would bring if it were offered for sale by one who wanted to sell, but was under no necessity, and was bought by one who wanted to buy, but was under no necessity.**

**In determining fair market value of the property taken, you may not consider that the property owner might, for personal reasons, have been unwilling to sell at fair market value or that the Commonwealth has a need for the property, nor can you consider the use that the Commonwealth will make of the property.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Ramsey v. Comm'r of Hwys, 289 Va. 490, 495, 770 S.E.2d 487, 489 (2015)*; *Lamar Corp. v. Commonwealth Transp. Comm'r of Virginia, 262 Va. 375, 386–87, 552 S.E.2d 61, 66–67 (2001)*; *Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 606–07, 221 S.E.2d 157, 160 (1976)*; *State Hwy. Comm'r v. Reynolds, 206 Va. 785, 787–89, 146 S.E.2d 261, 263–64 (1966)*; *State Hwy. Comm'r v. Crockett, 203 Va. 796, 798–99, 127 S.E.2d 354, 356 (1962)*; *Talbot v. City of Norfolk, 158 Va. 387, 391–92, 163 S.E. 100, 101 (1932)*; *Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 361–64, 137 S.E. 458, 460–61 (1927)*; *Appalachian Power Co. v. Johnson, 137 Va. 12, 28–30, 119 S.E. 253, 258 (1923)*.

### PRACTICE COMMENTARY

In determining the fair market value, evidence of sales of other property may be admitted into evidence if the offering party establishes that the sale was voluntary and free of compulsion and not by way of compromise. Transactions between an owner and the condemner fail to meet this test because they are influenced by compromise or compulsion. *Dean v. Prince William County, 281 Va. 536, 540–41, 708 S.E.2d 830, 832–33 (2011)*.

A pre-settlement appraisal of a property's fair market value obtained by the condemnor, however, is not an offer to settle and is therefore not inadmissible on that basis. Whether or not such an appraisal is otherwise admissible will depend upon the applicability of other rules of evidence. *Ramsey, 289 Va. 490, 496–97, 770 S.E.2d at 490–91 & n.3*.

☞ ***PRACTICE POINTER:*** Concerning the method of determining fair market value of billboard on condemned property, see *Lamar Corp., 262 Va. at 375, 552 S.E.2d at 61*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain

## Instruction No. 46.060
## Fair Market Value: Use of Property

**In determining fair market value, you should consider all of the uses which might reasonably have been made of the property in light of existing conditions and circumstances. In this respect, you should consider all of the natural advantages and disadvantages of the property as well as the characteristics and needs of the surrounding community which existed at the time of the taking or which probably would exist in the near future.**

**The uses to which the property is adaptable must be so reasonably probable as to have an effect on its fair market value. You may not consider imaginative or speculative uses.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Helmick Family Farms, LLC v. Comm'r of Highways, 297 Va. 777, 832 S.E.2d 1 (2019)*; *City of Va. Beach v. Oakes, 263 Va. 510, 518–19, 561 S.E.2d 726, 730 (2002)*; *Gray & Gregory v. GTE South Inc., 261 Va. 67, 71, 540 S.E.2d 498, 500 (2001)*; *Lamar Corp. v. Commonwealth Transp. Comm'r of Va., 262 Va. 375, 386–87, 552 S.E.2d 61, 67 (2001)*; *Fairfax County Park Auth. v. Virginia Dep't of Transp., 247 Va. 259, 262–63, 440 S.E.2d 610, 612–13 (1994)*; *State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 240, 257 S.E.2d 832, 835 n.2 (1979)*; *Appalachian Power Co. v. Anderson, 212 Va. 705, 708–11, 187 S.E.2d 148, 152–54 (1972)*; *Colonial Pipeline v. Lohman, 207 Va. 775, 782–84, 152 S.E.2d 34, 40–41 (1967)*; *Appalachian Elec. Power Co. v. Gorman, 191 Va. 344, 353–54, 61 S.E.2d 33, 37–38 (1950)*; *Pruner v. State Hwy. Comm'r, 173 Va. 307, 310–11, 4 S.E.2d 393, 394–95 (1939)*; *Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 361–64, 137 S.E. 458, 460–61 (1927)*; *Richmond & Petersburg Electric Ry. Co. v. Seaboard Air Line Ry., 103 Va. 399, 407–08, 49 S.E. 512, 515 (1905)*; *Appalachian Power Co. v. Johnson, 137 Va. 12, 28–30, 119 S.E. 253, 257–58 (1923)*.

### Practice Commentary

Potential development as a residential subdivision may be considered where it has begun to be realized at the time of the taking. *Gorman, 191 Va. at 355–56, 61 S.E.2d at 38–39*; *Johnson, 137 Va. at 28–30, 119 S.E. at 257–58*. A subdivision plat prepared in contemplation of the condemnation, and after the condemnation suit was filed, cannot be considered on the issue of damages. *Anderson, 212 Va. at 710–11, 187 S.E.2d at 153–54*. However, the condemnor was held to have "opened the door" for such proof in *Commonwealth, DOT v. Fairbrook Business Park Assoc., 244 Va. 99, 104–05, 418 S.E.2d 874, 877–78 (1992)*.

Evidence concerning the "reasonable probability" of a potential rezoning of the property is admissible to establish the fair market value of the property. The burden of establishing a reasonable probability of rezoning is on the property owner, and unless the evidence relating to the likelihood of rezoning rises to the level of probability, it is inadmissible. *Helmick Family Farm, LLC v. Comm'r of Highways, 297 Va. 777, 2019 Va. LEXIS 102, at *19 (Va. Aug. 29, 2019)*.

The presence of mineral deposits is an element to be considered in determining fair market value if the development of mineral deposits is consistent with the highest and best use of the property. *Board of County Supervisors v. Wilkerson, 226 Va. 84, 92, 307 S.E.2d 450, 454 (1983)*.

Because condemnation is an in rem proceeding, the value to be established is not the value to the owner personally. The fair market value is derived by considering the various uses to which the land is susceptible, not just those uses to which a particular owner may be restricted by, for example, a trust. *Fairfax County Park Auth., 247 Va. at 263, 440 S.E.2d at 612*; *Lamar Corp., 262 Va. at 386–87, 552*

*S.E.2d at 67.*

The landowner is not entitled to any increase in value of the property taken caused, in whole or in part, by the project. However, if the change in the property's highest and best use came about for reasons unrelated to the project, the property owner is entitled to the benefit of the property's consequent increase in value. *Commonwealth Transp. Comm'r v. DuVal, 238 Va. 679, 685–86, 385 S.E.2d 605, 608 (1989).*

The value of fixtures to real estate may be considered in determining fair market value. Whether certain property is fixtures or personal property is determined by the application of a three-part test: (1) its actual or constructive annexation to realty; (2) its adaptation to the use or purpose of the realty; and (3) the intention of the owner to make it a permanent part of the realty. *Taco Bell of America, Inc. v. Commonwealth Transp. Comm'r, 282 Va. 127, 131–32, 710 S.E.2d 478, 481–82 (2011).*

This instruction could be modified to suit particular facts which might otherwise render it confusing in a given situation. See *Talbot v. City of Norfolk, 158 Va. 387, 396, 163 S.E. 100, 103 (1932)*, where the court set aside the judgment of the commissioners not because of error relative to the instructions given or refused, but because the given instructions were misconstrued and misapplied by some commissioners.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.070**
**Damage to Residue**

**The measure of damages to the owner's remaining property is the difference between the fair market value of the remaining property immediately before the taking and its fair market value immediately after the taking.**

**You may consider all present circumstances, and all circumstances reasonably expected in the near future, in determining the effect of the taking on the value of the remaining property; you may not consider remote or speculative advantages or disadvantages of the taking on the value of the remaining property.**

**In determining the fair market value of the remaining property after the taking, you shall include any reduction in market value from lost access caused by the taking.**

**In determining the fair market value of the remaining property after the taking, you shall take into consideration any enhancement in the value of the remaining property by reason of the property taken and the use of the property taken.**

**You shall reduce your determination of the fair market value of the remaining property after the taking by the amount of any lost profits.**

**Although you may consider individual items of damage to the remaining property, you cannot compute the damages to the property by adding those items. Your determination of damages to the remaining property should be based on the overall difference between the fair market value of the remaining property before and after the taking, adjusted for any lost profits.**

**The owner has the burden of proving by the greater weight of the evidence, that there is damage to the remaining property.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-230, 25.1-230.1.

**CASE AUTHORITY:** *Virginia Elec. & Power Co. v. Hylton, 292 Va. 92, 106-07, 787 S.E.2d 106, 114–15 (2016); Byler v. Virginia Elec. & Power Co., 284 Va. 501, 508–09, 731 S.E.2d 916, 920–21 (2012); Livingston v. Va. DOT, 284 Va. 140, 155–57, 726 S.E.2d 264, 273–74 (2012); Commonwealth Transp. Comm'r v. Glass, 270 Va. 138, 154–55, 613 S.E.2d 411, 420 (2005); City of Va. Beach v. Oakes, 263 Va. 510, 516–18, 561 S.E.2d 726, 728–30 (2002); Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 394–95, 526 S.E.2d 4, 7–8 (2000); Chappell v. Virginia Elec. & Power Co., 250 Va. 169, 172–73, 458 S.E.2d 282, 284 (1995); Town of Rocky Mount v. Hudson, 244 Va. 271, 273, 421 S.E.2d 407, 408 (1992); East Tenn. Nat. Gas Co. v. Riner, 239 Va. 94, 97–98, 100, 387 S.E.2d 476, 478, 479–80 (1990); State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 239, 257 S.E.2d 832, 834–35 (1979); Colonial Pipeline v. Lohman, 207 Va. 775, 782–83, 152 S.E.2d 34, 40–41 (1967); State Hwy. Comm'r v. Reynolds, 206 Va. 785, 786–87, 146 S.E.2d 261, 262–63 (1966); State Hwy. Comm'r v. Crockett, 203 Va. 796, 800–01, 127 S.E.2d 354, 357–58 (1962); Ryan v. Davis, 201 Va. 79, 82–83, 109 S.E.2d 409, 412–13 (1959); Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 472–74, 78 S.E.2d 677, 680–81 (1953); Appalachian Power Co. v. Gorman, 191 Va. 344, 353–55, 61 S.E.2d 33, 37–38 (1950); West v. Anderson, 186 Va. 554, 563–64, 42 S.E.2d 876, 880–81 (1947); Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941); Chairman, Hwy. Comm'n v. Fletcher, 153 Va. 43, 46–47, 49–50, 149 S.E. 456, 457, 458 (1929); Richmond & Mecklenburg R.R. Co. v. Humphreys, 90 Va. 425, 434–36, 18 S.E. 901, 904–06 (1894).*

## PRACTICE COMMENTARY

Instruction No. 46.120, Landowner's Duty to Mitigate Damages, should be read in conjunction with this instruction. A landowner is not entitled to the cost of restoring the residue to its former state because this would allow a double recovery. He would recover once for the loss of value to the residue from the loss of the fixture and a second time for the cost of restoring it to the remaining land. Under Instruction No. 46.120, however, the cost of adjusting the residue to the new conditions caused by the taking is compensable. See *Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 394, 526 S.E.2d 4, 8 (2000); WAMMCO, Inc. v. Commonwealth Transp. Comm'r, 251 Va. 132, 137–38, 465 S.E.2d 584, 586–87 (1996); Commonwealth Transp. Comm'r v. Thompson, 249 Va. 292, 297–98, 455 S.E.2d 206, 209 (1995); State Hwy. & Transp. Comm'r v. Parr, 217 Va. 522, 524–25, 230 S.E.2d 253, 255–56 (1976); City of Staunton v. Aldhizer, 211 Va. 658, 660–62, 179 S.E.2d 485, 487–88 (1971); Dressler v. City of Covington, 208 Va. 520, 522–23, 158 S.E.2d 660, 662 (1968); Long v. Shirley, 177 Va. 401, 414–15, 14 S.E.2d 375, 380–81 (1941).*

Any permanent inconvenience in using the residue affects its market value and, so, affects damages. *Long, 177 Va. at 414–15, 14 S.E.2d at 380–81.*

A single act of flooding can support an inverse condemnation claim. *Livingston,*

*284 Va. at 152, 726 S.E.2d at 271.* In *Byler,* the Court reaffirmed the principle that there could be no recovery where there was no proof of damage to the property itself; the only proof of diminution in value was that the property was made less desirable and the owner's "personal pleasure or enjoyment" was infringed. *284 Va. at 509, 731 S.E.2d at 921.* Damage to fair market value of residue that is attributable to public fears of electromagnetic fields may be compensable if the damage is quantified. *Chappell, 250 Va. at 172–73, 458 S.E.2d at 284.* However, in *Chappell,* the Court affirmed the trial court's exclusion of evidence of public fear about high voltage lines on adjacent property and the effect of that fear on the market value of the property because the landowner did not present evidence of comparable sales at prices allegedly diminished by this fear. *Id.*

The costs of relocating personal property incurred after the taking may be compensable independent of the fair market value. *Bristol Redev. & Hous. Auth. v. Farmbest, Inc., 215 Va. 106, 107–08, 205 S.E.2d 406, 407 (1974); City of Richmond v. Old Dominion Iron Corp., 212 Va. 611, 618–20, 186 S.E.2d 30, 36–37 (1972); City of Richmond v. Williams, 114 Va. 698, 702–03, 77 S.E. 492, 493–94 (1913).*

Relocation expenses incurred before the time of the taking may be recovered in a separate proceeding under Va. Code Ann. § 25.1-406 et seq., but otherwise "it is the 'taking' which gives birth to the right to 'just compensation.' "*Farmbest, 215 Va. at 108, 205 S.E.2d at 408.*

There are several items that may not be considered in determining the damage to the residue. For example, speculative future use for strip-mining coal is not to be considered. *Riner, 239 Va. at 97–98, 387 S.E.2d at 478; Hylton, 292 Va. at 107–08, 787 S.E.2d at 115* (value of surface mine not in existence at the time of the taking is speculative). Also, the speculative value of mineral deposits and future rents and royalties derived from them, if and when removed from the land, are inadmissible to prove value of the property or damage to the residue. *Id at 107, 787 S.E. 2d at 114.* See also Instruction No. 46.150, Highway Condemnation: Definition of Limited Access Highway.

The jurors' view cannot be the "sole evidence" in the case. Va. Code Ann. § 25.1-231.

### ***ALERTS:***

- The determination of just compensation for damage to the residue shall include any lost access and lost profits.
- If lost access and/or lost profits are not in evidence, then this instruction should be modified to remove those elements of damage.

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.080
## Lost Access

**"Lost access" means a material impairment of direct access to the remainder of the property.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 25.1-100, 25.1-230.1(B).

**Case Authority:** *Hooked Grp., LLC v. City of Chesapeake, ___ Va. ___; 842 S.E.2d 413 (2020)*; *State Hwy. & Transp. Comm'r v. Dennison, 231 Va. 239; 343 S.E.2d 324 (1986).*

### Practice Commentary

"Lost access" is defined as "a material impairment of direct access to property, a portion of which has been taken or damaged as set out in subsection B of Va. Code Ann. § 25.1-230.1. This definition of the term 'lost access' shall not diminish any existing right or remedy, and shall not create any new right or remedy other than to allow the body determining just compensation to consider a change in access in awarding just compensation. Va. Code Ann. § 25.1-100. Landowners have a right to gain access to public streets from their property. Lost access due to a government's exercise of police power can constitute a taking under certain circumstances. *Hooked Grp., 842 S.E.2d at 417.* The inquiry involves several steps: (1) does the landowner retain reasonable access to the property following a taking or governmental action under the police power; and (2) even if the remaining access is reasonable, has the landowner suffered a loss of access that is (a) *direct* (indirect loss of access is not compensable), and (b) *material.* i.e. significant, essential, or of real importance? *Hooked Grp., LLC, ___ at ___, 842 S.E.2d at 418–419.*

### *ALERTS:*

None.

**Instruction No. 46.085**
**Lost Profits**

**"Lost profits" means a loss of business profits from a business or farm operation conducted on the property taken that is directly and proximately caused by the taking of the property. "Business profit" means the average net income for federal income tax purposes for the three years immediately prior to the valuation date set forth in Instruction No. _____ [insert applicable number from the instructions given to the jurors].**

**The owner has the burden of proving the amount of lost profits with reasonable certainty.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-100, 25.1-230.1.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

See Instruction No. 46.040 for the date of valuation.

### *ALERTS:*

- If there is a dispute as to whether or not the owner has established any one or more of the conditions related to lost profits set forth in Va. Code Ann. § 25.1-230.1(C), additional instructions specific to the dispute will need to be drafted for use in conjunction with this Instruction.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.090
## Effect of Enhancement on Damage to Residue

**If you find that the Commonwealth's taking and use of the owner's property enhances the value of the remaining property, then you shall consider the enhancement in determining the fair market value of the remaining property.**

**If the enhancement increases the fair market value of the remaining property after the taking** [adjusted for lost profits,] **equal to or greater than the fair market value of the property before the taking, then you cannot award any sum for damage to the remaining property.**

**You cannot charge the property owner if the enhancement is more than the damage to the remaining property. You cannot deduct the enhancement in value from the fair market value of the property which has been taken.**

**The Commonwealth has the burden of proving, by the greater weight of the evidence, any enhancement in value to the remaining property.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-230, 33.2-1028.

**CASE AUTHORITY:** *State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 239, 257 S.E.2d 832, 834–35 (1979)*; *Campbell v. State Hwy. Comm'r, 209 Va. 509, 511–12, 165 S.E.2d 281, 283–84 (1969)*; *May v. Malcolm, 202 Va. 78, 83, 116 S.E.2d 114, 118–19 (1960)*; *Ryan v. Davis, 201 Va. 79, 82, 109 S.E.2d 409, 412 (1959)*; *West v. Anderson, 186 Va. 554, 564–65, 42 S.E.2d 876, 881 (1947)*; *Long v. Shirley, 177 Va. 401, 409–10, 14 S.E.2d 375, 378–79 (1941)*; *Town of Galax v. Waugh, 143 Va. 213, 242, 129 S.E. 504, 512 (1925).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- The condemnation statutes were significantly amended in 2013. Some cases cited in the commentary were decided under prior law.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, *Eminent Domain* §§ 1 through 103

## Instruction No. 46.100
## Damage to Residue: Formula for Determining

**You may use the following formula to calculate the damage to the owner's remaining property as a result of the taking:**

**(1) Determine the fair market value of the entire property immediately before the taking.**

**(2) Determine the fair market value of the property that was taken.**

**(3) Subtract (2) from (1). This is the value of the remaining property before taking.**

**(4) Determine the fair market value of the remaining property after the taking, taking into consideration any enhancement in value as a result of the taking and the use of the property taken.**

**(5) Determine the lost profits, if any, as a result of the taking.**

**(6) Subtract (5) from (4). This is the fair market value of the remaining property after the taking, adjusted for profits.**

**(7) Subtract (6) from (3). This is the total damage to the remaining property. If (6) is greater than (3), there is no damage to the remaining property.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *State Hwy. & Transp. Comm'r v. Parr, 217 Va. 522, 524–25, 230 S.E.2d 253, 255–56 (1976)*; *Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972).*

### PRACTICE COMMENTARY

None.

### *ALERTS:*

- The determination of just compensation for damage to the residue includes any lost access and lost profits. Va. Code Ann. § 25.1-230.1.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.110
## Weight of Evidence—Value

**In determining your award, you should consider, but you are not bound by, the opinion testimony that has been presented, and the facts and circumstances on which those opinions were based.**

**In weighing the opinion testimony presented, you may consider the facts you acquired from your view of the property, but the view may not be considered by you as the only evidence in the case. Your award must bear a reasonable relationship to all of the evidence presented.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 25.1-231.

**CASE AUTHORITY:** *Commonwealth Transp. Comm'r v. Glass, 270 Va. 138, 153–55, 613 S.E.2d 411, 420 (2005)*; *Hamer v. School Bd. of Chesapeake, 240 Va. 66, 73, 393 S.E.2d 623, 627–28 (1990)*; *State Hwy. Comm'r v. Foster, 216 Va. 745, 748, 222 S.E.2d 780, 782 (1976)*; *State Hwy. & Transp. Comm'r v. Carter, 216 Va. 639, 641–42, 222 S.E.2d 776, 778 (1976)*; *Virginia Elec. & Power Co. v. Pickett, 197 Va. 269, 275–76, 89 S.E.2d 76, 80–81 (1955)*; *Appalachian Power Co. v. Gorman, 191 Va. 344, 357–58, 61 S.E.2d 33, 40 (1950)*; *Kornegay v. City of Richmond, 185 Va. 1013, 1026–27, 41 S.E.2d 45, 51 (1947)*.

### PRACTICE COMMENTARY

This instruction is not limited to expert testimony because the property owner, though not a real estate expert, may give his or her opinion as to the value of his or her property.

If there is a legitimate dispute as to damages to the residue and/or the value of those damages, then both parties are allowed to present expert testimony on that issue. *Comm'r of Hwys v. Karverly, Inc., 295 Va. 380, 813 S.E.2d 322 (2018)*.

### *ALERTS:*

- Should the award of the jurors exceed the value of the property established by the pleading or testimony of the owner, see *Colonial Pipeline v. Lohman, 207 Va. 775, 780, 152 S.E.2d 34, 38 (1967)*; *West v. Anderson, 186 Va. 554, 566, 42 S.E.2d 876, 881–82 (1947)*.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.120
## Landowner's Duty to Mitigate Damages

**A property owner has a duty to minimize any damages to his remaining property that will result from the use which the Commonwealth intends to make of the property taken. Therefore, you may consider the reasonable expense of adjusting the remaining property to the new conditions in determining the damage to the remaining property if such expenditures will minimize damage that would otherwise occur.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *City of Virginia Beach v. Oakes, 263 Va. 510, 518, 561 S.E.2d 726, 729–30 (2002)*; *Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 394–95, 526 S.E.2d 4, 7–8 (2000)*; *WAMMCO, Inc. v. Commonwealth Transp. Comm'r, 251 Va. 132, 137–39, 465 S.E.2d 584, 586–88 (1996)*; *State Hwy. & Transp. Comm'r v. Parr, 217 Va. 522, 524–26, 230 S.E.2d 253, 255–56 (1976)*; *Bradshaw v. State Hwy. Comm'r, 210 Va. 66, 68, 168 S.E.2d 129, 130 (1969)*.

### PRACTICE COMMENTARY

See Instruction No. 9.020, Duty to Mitigate Damages.

Evidence of the actual cost of necessary improvements is admissible as a factor of evaluations, though not as a measure of damages. Adjustment costs are not admissible at all if based upon remote or speculative factors. *WAMMCO, 251 Va. at 137–38, 465 S.E.2d at 587.*

### *ALERTS:*

- Adjustment costs are not items of damage. They are only admissible to aid in determining the difference in market value. Instruction No. 46.070, Damage to Residue. *State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 241, 257 S.E.2d 832, 836 (1979).*

- The jurors must be told that their award for damages cannot exceed the difference in market value regardless of the amount of adjustment damages. *Allmond, 220 Va. at 241, 257 S.E.2d at 836.*

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.130**
**"Quotient" Award Not Permitted**

**You may not arrive at your award by what is called the "quotient method." That is, you may not agree to award the average of your individual opinions of value. An award made in this way is not valid.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Virginia Elec. & Power Co. v. Pickett, 197 Va. 269, 277, 89 S.E.2d 76, 81–82 (1955); Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 476–77, 78 S.E.2d 677, 681–82 (1953).*

**PRACTICE COMMENTARY**

None.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

**Instruction No. 46.140**
**Majority Award Permitted**

**It is not necessary that all of you agree on the report you make. A majority of you have a right to prepare a report and submit it to the court.**

**If you arrive at a majority report, those of you in the minority may submit a minority report to the court.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-229, 25.1-232.

**CASE AUTHORITY:** *Board of Supervisors v. Parsons, 245 Va. 489, 491, 428 S.E.2d 905, 906 (1993)*; *Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 476–77, 78 S.E.2d 677, 682 (1953)*; *Norfolk & W. Ry. v. Virginian Ry., 110 Va. 631, 645–47, 66 S.E. 863, 868 (1910).*

**PRACTICE COMMENTARY**

None.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.150
## Highway Condemnation: Definition of Limited Access Highway

**The land described in the petition is being taken for a "limited access highway." A limited access highway is a highway especially designed for through traffic. Abutting landowners have no easement or right to light, air, or access just because their property abuts the limited access highway.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va Code. Ann. §§ 33.2-400, 33.2-401.

**CASE AUTHORITY:** None.

**PRACTICE COMMENTARY**

None.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

## Instruction No. 46.160
## [RESERVED]

**Instruction No. 46.170**
**[RESERVED]**

**Instruction No. 46.180**
**Elements of Report**

**Your report shall consist of two separate items:**

**(1) the fair market value of the property taken by the Commonwealth;**

**(2) the damage, if any, to the remaining property resulting from the taking and from the use of the property taken.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 25.1-230, 25.1-232.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

None.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 27.22

Kent Sinclair & Leigh Middleditch, VIRGINIA CIVIL PROCEDURE § 3.2

Kent Sinclair, VIRGINIA REMEDIES §§ 3-3, 3-6

MICHIE'S JURISPRUDENCE, Eminent Domain §§ 1 through 103

# Chapter 47

# INSURANCE



## Scope Note

**Instruction No. 47.000** Definition of Appointed Agent or Appointed Insurance Agent
**Instruction No. 47.020** Agent for Insurer
**Instruction No. 47.030** Agent's Acts Bind Insurer
**Instruction No. 47.040** Agent's Apparent Authority
**Instruction No. 47.050** Limits on Agent's Authority Unknown to Insured
**Instruction No. 47.060** Ratification of Agent's Unauthorized Acts
**Instruction No. 47.070** Agent's Knowledge Binds Insurer
**Instruction No. 47.080** Existence of Policy: Burden of Proof
**Instruction No. 47.090** Essential Elements of Insurance Contract
**Instruction No. 47.100** Oral Contracts and Binders
**Instruction No. 47.110** Inception of Insurance Contract
**Instruction No. 47.120** Cancellation by Insurer: Burden of Proof
**Instruction No. 47.125** Renewal Policy: Acceptance
**Instruction No. 47.130** Recovery Under the Policy: Burden of Proof
**Instruction No. 47.140** Defense to Liability: Loss Not Covered
**Instruction No. 47.150** Waiver of Provisions Benefitting the Insurer
**Instruction No. 47.160** Estoppel to Assert Forfeiture
**Instruction No. 47.170** Issuing Policy With Knowledge of Breach
**Instruction No. 47.180** Proof of Loss or Waiver
**Instruction No. 47.190** Effect of Proof of Loss on Recovery at Trial
**Instruction No. 47.200** Notice to Insurer: Reasonable Time
**Instruction No. 47.210** Untrue Statements in Application
**Instruction No. 47.220** Answers Recorded by Agent
**Instruction No. 47.500** Definition of Accidental
**Instruction No. 47.510** Accident: Insured the Aggressor
**Instruction No. 47.515** Intentional Act
**Instruction No. 47.520** Permanent Total Disability
**Instruction No. 47.530** Policy Coverage: Burden of Proof
**Instruction No. 47.540** Policy Exclusions: Burden of Proof

**Instruction No. 47.550 Pre-Existing Condition**
**Instruction No. 47.600 [RESERVED]**
**Instruction No. 47.610 [RESERVED]**
**Instruction No. 47.700 Permissive Use Omnibus Clause**
**Instruction No. 47.710 Duty to Settle**
**Instruction No. 47.800 [RESERVED]**
**Instruction No. 47.810 Suicide: Burden of Proof**
**Instruction No. 47.820 Accidental Death: Pre-Existing Condition**

# SCOPE NOTE

These instructions cover the topic of insurance. The topic is divided into: instructions on general aspects of insurance law, Instruction Nos. 47.000 to 47.220; instructions on accident and sickness insurance, Instruction Nos. 47.500 to 47.550; instructions on liability insurance, Instruction Nos. 47.700 to 47.710; and instructions on life insurance, Instruction Nos. 47.810 to 47.820. See the sections below regarding the specific types of insurance.



Instruction No. 47.000 provides the basic definition of "appointed agent" or "appointed insurance agent." Other types of agents are defined in Va. Code Ann. § 38.2-1800.

A great deal of complex agency law is encompassed within these instructions. See also Chapter 8, Agency, Employment and Similar Relationships; Chapter 42, Attorney and Client; and Chapter 43, Brokers. Instruction Nos. 47.020 to 47.070 cover the relationship between an insurance company and its agents. Instruction No. 47.020 is used in cases where an insurance agent is unable or unwilling to sell insurance in his or her own company to the applicant; if he or she procures the insurance elsewhere, he or she is that insurance company's agent and not the insured's. Instruction No. 47.030 explains that the acts of an agent bind the insurance company as long as the agent has actual authority, either express or implied. Instruction No. 47.040 is used in cases where the insurance company has acted towards third parties in such a way that the acts of the agent bind the company because of the agent's apparent authority. Instruction No. 47.050 explains that a person may deal with an agent on the basis of the agent's apparent authority unless he or she knows of limits on the agent's authority. Instruction No. 47.060 covers when an insurance company ratifies its agent's conduct. Instruction No. 47.070 is a statement of the familiar principle that an insurance company is legally bound by the knowledge or notice received by its agent.

Instruction Nos. 47.080 to 47.125 concern the formation, cancellation and renewal of an insurance contract. Instruction No. 47.080 explains that the plaintiff has the burden of proving the existence of the insurance policy. Instruction No. 47.090 covers the essential elements of an insurance contract. Instruction No. 47.100 covers oral contracts and binders. Instruction No. 47.110 states when an insurance contract begins. Instruction No. 47.120 deals with policy cancellation and an insurance company's burden of proof when it cancels a policy. Instruction No. 47.125 sets forth the principles applicable to renewal of an insurance policy. Insurance contracts are governed by principles of contract law and the Practice Commentary accompanying these instructions contain extensive discussion of contract principles that have arisen in insurance cases. The special problems that arise in applications for insurance are treated at the end of the general insurance instructions.

Instruction Nos. 47.130 to 47.200 cover various issues that arise when recovery under a policy is sought. Instruction No. 47.130 states that the insured has the burden of proving that his or her loss occurred while the policy was in effect. Instruction No. 47.140 is to be used when the insurance company denies liability on the ground that the loss falls under a policy exclusion. Instruction No. 47.150 is used when there is an issue of whether the company has waived rights to which it was otherwise contractually entitled under the policy. Instruction No. 47.160 is an estoppel instruction. Given the

similarity between waiver and estoppel, the practitioner should read both Instruction Nos. 47.150 and 47.160 before choosing to use either.

Instruction No. 47.170 is a particularized waiver instruction. An insurance company waives rights if it issues a policy knowing that the insured has breached its terms or learns of a breach but continues to accept premiums from the policyholder.

Instruction Nos. 47.180 to 47.200 deal with problems arising out of proof of loss clauses. Instruction No. 47.180 states that an insured can only recover by complying with the proof of loss clause or by showing that the insurance company waived compliance or is estopped from demanding it. Instruction No. 47.190 deals with the effect at trial of statements and misstatements made in the proof of loss. Instruction No. 47.200 covers the requirement that the insured must furnish the company with reasonable notice.

Instruction Nos. 47.210 and 47.220 cover misstatements by the insured in the policy application. Chapter 39, Fraud, is also generally applicable here.

Because of the multiplicity of factual situations which may be involved in insurance law, these instructions are designed only as a starting point in drafting instructions to fit specific cases.

***Accident and Sickness Insurance***

Chapter 3 of Title 38.2 sets out certain statutory provisions relating to all insurance policies, including accident and sickness provisions. As defined in Va. Code Ann. § 38.2-109, accident and sickness insurance "means insurance against loss resulting from sickness, or from bodily injury or death by accident or accidental means, or from a combination of any or all of these perils."

Chapters 34 and 35 contain specific provisions relating to accident and sickness insurance policies. Chapter 36 governs Medicare supplement policies. Chapter 37.1 includes credit accident and sickness insurance.

These statutory provisions should be consulted in every case involving accident and sickness insurances. There are no instructions drawn from the various self-explanatory statutory provisions. Instruction Nos. 47.500 to 47.550 related to accident and sickness insurance are all drawn from the cases.

***Fire Insurance***

Chapter 3 of Title 38.2 sets out certain statutory provisions relating to all insurance policies, including fire. Chapter 21 contains specific provisions relating to fire insurance policies. These statutory provisions should be consulted in every case involving fire insurance. Although stand-alone fire insurance model jury instructions are not offered, the other instructions contained in this chapter are easily adapted to that purpose when needed.

In the case of realty owned as tenants by the entirety, neither spouse can recover under the policy with respect to the loss of the realty if the other spouse has committed arson. *Rockingham Mut. Fire Ins. Co. v. Hummel, 219 Va. 803, 806, 250 S.E.2d 774, 776 (1979).*

"[E]ven absent a joint interest between insureds and notwithstanding that one of the insureds may be innocent of any wrongdoing, resort must be had to the form of the insurance contract to determine the rights and liabilities of the parties." *K & W Builders,*

*Inc. v. Merchants and Business Men's Mut. Ins. Co., 255 Va. 5, 10, 495 S.E.2d 473, 476 (1998).*

***Liability Insurance***

Chapter 3 of Title 38.2 sets out certain statutory provisions relating to all insurance policies, including liability insurance. Chapter 22 contains specific provisions relating to liability insurance policies. There are no instructions drawn from the various self-explanatory statutory provisions. Instruction Nos. 47.700 and 47.710 related to liability insurance are drawn from the cases.

***Life Insurance***

Chapter 3 of Title 38.2 sets out certain statutory provisions relating to all insurance policies, including life insurance. Specific provisions applicable to life insurance are found in Chapters 31, 32, and 33 of Title 38.2. These sections deal with the various kinds of life insurance policies and companies, and you should consult them before drafting instructions. There are no instructions drawn from the various self-explanatory statutory provisions. Instruction Nos. 47.810 and 47.820 related to life insurance are drawn from cases.

## Instruction No. 47.000
## Definition of Appointed Agent or Appointed Insurance Agent

**"Appointed agent" or "appointed insurance agent" means** [an individual; a partnership; a corporation; a limited liability company] **licensed in this Commonwealth to sell, solicit, or negotiate contracts of insurance or annuity of the classes authorized within the scope of such license and who is appointed by a company licensed in this Commonwealth to sell, solicit, or negotiate on its behalf contracts of insurance of the classes authorized within the scope of such license and, if authorized by the company, may collect premiums on those contracts.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 38.2-1800.

**CASE AUTHORITY:** None.

### PRACTICE COMMENTARY

Statutory definitions set forth in Va. Code Ann. § 38.2-100 should also be consulted. "Insurer" means an insurance company. An "insurance company" is any company engaged in the business of making contracts of insurance. Other statutory definitions that may prove useful for more particularized instructions include "alien company," "company," "domestic company," and "foreign company."

In any controversy between an insured or his or her beneficiary and the insurer, a licensed agent shall be held to be the agent of the company that issued the insurance sold, solicited, or negotiated by such agent. Va. Code Ann. § 38.2-1801(A).

☞ ***PRACTICE POINTER:*** Agency concepts are also discussed in Chapter 8, Agency, Employment and Similar Relationships; and Chapter 42, Attorney and Client.

### *ALERTS:*

- See Va. Code Ann. § 38.2-1800 for definitions of other types of insurance agents.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.020
## Agent for Insurer

**An insurance agent who obtains insurance for an applicant in a company that the agent does not normally represent is, nevertheless, an agent of that company and not of the insured.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Harris v. K & K Ins. Agency, 249 Va. 157, 160, 453 S.E.2d 284, 286 (1995)*; *Pacific Fire Ins. Co. v. Bowers, 163 Va. 349, 355, 175 S.E. 763, 765 (1934).*

### PRACTICE COMMENTARY

Sometimes the Court has used estoppel language to hold an insurance company to a policy that was advantageous to it until a loss occurred. The following language might be used in a case involving estoppel:

"An insurance company, as other principals, is estopped from denying that a certain person is its agent, where it knowingly causes or permits him so to act as to justify third persons of reasonable intelligence in believing that he is the company's agent." *Creech v. Mass. Bonding & Ins. Co., 160 Va. 567, 576, 169 S.E. 545, 547 (1933).*

Sometimes these cases are treated as matters of apparent authority. The insurance company's acts towards others are taken as a holding out that a person, who is not actually an agent, is an agent. See Instruction Nos. 47.040, Agent's Apparent Authority; 47.150, Waiver of Provisions Benefitting the Insurer; 47.160, Estoppel to Assert Forfeiture.

### *ALERTS:*

- For the definition of insurance agent, see Va. Code Ann. § 38.2-1800. Va. Code Ann. § 38.2-1801 applies to the agency relationship where there is a controversy between the insured or his beneficiary and the insurer.

- Frequently, the jury should simply be instructed: "Jones was the agent of Ajax Insurance Co."

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.030
## Agent's Acts Bind Insurer

**The acts and declarations of the agent of an insurance company, acting within the scope of his** [actual; apparent] **authority, are binding on the insurance company.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P., 263 Va. 377, 386, 560 S.E.2d 246, 251 (2002)*; *Equitable Variable Life Ins. Co. v. Wood, 234 Va. 535, 539, 362 S.E.2d 741, 743–44 (1987)*; *State Farm Mut. Auto. Ins. Co. v. Miller, 194 Va. 589, 593, 74 S.E.2d 145, 147 (1953)*; *Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 345, 46 S.E.2d 377, 381 (1948)*; *Georgia Home Ins. Co. v. Kinnier, 69 Va. (28 Gratt.) 88, 110 (1877)*; *Continental Ins. Co. v. Kasey, 66 Va. (25 Gratt.) 268, 274 (1874).*

### PRACTICE COMMENTARY

There may be cases where it is necessary to spell out that an agent's acts that are expressly or impliedly authorized by the company are binding on the company. In such a case, the following language may be used:

> An insurance company is legally bound by the acts of its agent within the authority that the company has actually given him or her. This includes the precise acts which it authorized him or her to perform and the acts that are necessary to the performance of the expressly authorized acts [unless the extent of the agent's authority was expressly limited by the company].

This language is a paraphrase of *Michie's Jurisprudence, Agency* § 19. Cases using language similar to the language quoted above are not insurance cases. See, e.g., *Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 235, 6 S.E.2d 562, 564 (1939)*; *Riverview Land Co. v. Dance & Co., 98 Va. 239, 242, 35 S.E. 720, 721 (1900)*; *Smith v. Tate, 82 Va. 657, 664 (1886)*; *Yerby v. Grigsby, 36 Va. (9 Leigh) 387, 387 (1838)*. The instruction was converted from one of principal-agent to one of insurance company-agent because the powers of insurance agents are governed by the law of agency. *Globe Mut. Life Ins. Co. v. Wolff, 95 U.S. 326, 330 (1877)*; 43 Am. Jur. 2d *Insurance* § 144.

The breadth of actual authority is determined by examining the things said and done between the company and the agent. Apparent authority, which is the subject of Instruction No. 47.040, is created by things said and done between the insurance company and third persons.

Limits on the agent's authority that are not disclosed to the insured third party do not limit the agent's ability to bind the insurer. *Bituminous Cas. Corp. v. Baldwin, 196 Va. 1020, 1025, 86 S.E.2d 836, 839 (1955)*; *Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 345, 46 S.E.2d 377, 381 (1948)*; *Royal Indem. Co. v. Hook, 155 Va. 956, 968, 157 S.E. 414, 418 (1931)*; *Goode & Co. v. Georgia Home Ins. Co., 92 Va. 392, 396, 23 S.E. 744, 745 (1895)*; *Georgia Home Ins. Co. v. Kinnier, 69 Va. (28 Gratt) 88, 110 (1877).*

☞ ***PRACTICE POINTER:*** An insurance company is responsible for the acts and declarations of the clerks and employees of its agents to whom the agent has delegated authority to act on behalf of the company. *State Farm Mut. Auto. Ins. Co., 194 Va. at 592–93, 74 S.E.2d at 147–48*; *Northern Neck Mut. Fire Ass'n v.*

*Turlington, 136 Va. 44, 51–52, 116 S.E. 363, 365 (1923)*; *Goode & Co., 92 Va. at 395, 23 S.E. at 745.*

***ALERTS:***

- The term "authority" is used here because it encompasses both "express" and "implied" authority.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.040
## Agent's Apparent Authority

**Apparent authority is the authority that an insurance company has held out its agent as possessing or that it has permitted its agent to represent that he possesses.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Kern v. J.L. Barksdale Furniture Corp. 224 Va. 682, 685, 299 S.E.2d 365 (1983)*; *Dudley v. Estate Life Ins. Co. of America, 220 Va. 343, 349–50, 257 S.E.2d 871, 875 (1979)*; *East Augusta Mut. Fire Ins. Co. v. Hite, 219 Va. 677, 680, 250 S.E.2d 348, 351 (1979).*

### PRACTICE COMMENTARY

"Oral contracts to insure or temporary contracts of insurance are held binding when they have been made by general agents or duly authorized agents acting with express or implied authority, or within the apparent or ostensible scope of their authority." *Peoples Life Ins. Co. v. Parker, 179 Va. 662, 666–67, 20 S.E.2d 485, 486 (1942).*

There can be no apparent authority created by an undisclosed principal. RESTATEMENT (SECOND) OF AGENCY § 8, cmt. a (1958). Apparent authority results from the insurer's manifestations made to a third person and not, as when actual authority is created, to the agent. *Nolde Bros Inc. v. Chalkley, 184 Va. 553, 567, 35 S.E.2d 827, 833 (1945)*; RESTATEMENT (SECOND) OF AGENCY § 8, cmt. a (1958). Agency may be inferred from the conduct of the parties and from the surrounding facts and circumstances. *Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P., 263 Va. 377, 384, 560 S.E.2d 246, 250 (2002)*; *Drake v. Livesay, 231 Va. 117, 121, 341 S.E.2d 186, 189 (1986).*

" 'Apparent authority' arises from facts and circumstances which cause another to change his position to his detriment." *Nolde Bros Inc., 184 Va. at 567, 35 S.E.2d at 833.*

When an insurance company clothes a person with apparent authority to deliver policies and receive premiums, the company is estopped from arguing that the agent acted without written authority. *Wytheville Ins. & Banking Co. v. Teiger, 90 Va. 277, 282, 18 S.E. 195, 197 (1893).* Note, however, that the agent's apparent authority can bind the insured as well as the insurer. *Equitable Variable Life Ins. Co. v. Wood, 234 Va. 535, 539, 362 S.E.2d 741, 743–44 (1987).*

Apparent authority exists only to the extent that it is objectively reasonable for the third person dealing with the agent to believe that the agent is authorized. RESTATEMENT (SECOND) OF AGENCY § 8, cmt. a (1958). See *Wright v. Shortridge, 194 Va. 346, 353, 73 S.E.2d 360, 364–65 (1952)*; *Richmond Guano Co. v. E.I. Du Pont de Nemours & Co., 284 F. 803, 807 (4th Cir. 1922).* Furthermore, the third person must subjectively believe the agent to be authorized. RESTATEMENT (SECOND) OF AGENCY § 8, cmt. c (1958).

### *ALERTS:*

- For a discussion of the difference between "apparent authority" and "apparent or ostensible agency" see *Sanchez v. Medicorp Health System, 270 Va. 299, 303–04, 618 S.E.2d 331, 333 (2005).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.050
## Limits on Agent's Authority Unknown to Insured

**A person who has no notice or knowledge of any limitations upon the agent's authority may deal with the agent on the basis of the agent's apparent authority.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Marshall Erdman & Assocs. v. Loehr, 24 Va. App. 670, 679, 485 S.E.2d 145, 149 (1997)*; *Equitable Variable Life Ins. Co. v. Wood, 234 Va. 535, 538 n.1, 362 S.E.2d 741, 743 n.1 (1987)*; *Maryland Cas. Co. v. Craig, 213 Va. 660, 663–64, 194 S.E.2d 729, 732 (1973)*; *Bituminous Cas. Corp. v. Baldwin, 196 Va. 1020, 1025, 86 S.E.2d 836, 839 (1955)*; *Mutual Life Ins. Co. v. Brown, 137 Va. 278, 284, 119 S.E. 142, 144 (1923).*

## PRACTICE COMMENTARY

Reliance on an agent's apparent authority is not justified if the insured knows the limitations on the agent's power or if they are plainly inferable from the nature of the agent's employment. *Elliott v. Interstate Life & Acci. Ins. Co., 211 Va. 240, 245, 176 S.E.2d 314, 317 (1970)*; *Spicer v. Hartford Fire Ins. Co., 171 Va. 428, 435, 199 S.E. 499, 502 (1938)*; *Eastern Shore of Virginia Fire Ins. Co. v. Kellam, 159 Va. 93, 102–03, 165 S.E. 637, 639–40 (1932)*; *Northern Neck Mut. Fire Ass'n of Virginia v. Turlington, 136 Va. 44, 52, 116 S.E. 363, 365 (1923)*; *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 437, 46 S.E. 463, 466 (1904)*; *Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 240, 28 S.E. 209, 212–13 (1897).*

A provision in an application that expressly limits the agent's authority is sufficient to put the applicant on notice as to these limitations, regardless of whether the applicant actually reads the application. *Elliott, 211 Va. at 245, 176 S.E.2d at 317–18*; *Peoples Life Ins. Co. v. Parker, 179 Va. 662, 667, 20 S.E.2d 485, 486 (1942).*

If an agent for the insurance company falsely fills out an application or policy despite the insured giving truthful answers to the questions, the insurance company cannot rely upon the falsity of the answers in seeking to avoid liability under the policy issued upon the application. However, the insured will not receive the benefits of such policy if fraud, collusion, actual knowledge, or circumstances from which constructive knowledge of such falsity might be imputed to the insured exist. The agent acts for the insurer, and therefore the insurer is estopped from raising the mistake. *Gilley v. Union Life Ins. Co., 194 Va. 966, 974, 76 S.E.2d 165, 170 (1953).*

A general agent may waive conditions in the policy despite language in the policy purporting to limit the agent's ability to do so. A forfeiture for a violation of an existing policy will not be recognized where the agent knew of the existing facts at the time of accepting a renewal premium. *Virginia Fire & Marine Ins. Co., 102 Va. at 437–38, 46 S.E.2d at 466.*

The Supreme Court of Virginia has also indicated that persons dealing with mutual insurance companies are "affected with notice of the provisions and limitations of its charter, constitution, and by-laws . . . ." *Northern Neck Mut. Fire*

*Ass'n of Virginia, 136 Va. at 52, 116 S.E.2d at 365.*

***ALERTS:***

None.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.060**
**Ratification of Agent's Unauthorized Acts**

**If an insurance company had knowledge of all material facts, and if it accepted the benefit of the act of its agent, it is bound by that act, even if it was unauthorized.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Mutual Life Ins. Co. v. Brown, 137 Va. 278, 284–85, 119 S.E. 142, 144 (1923).*

### PRACTICE COMMENTARY

Ratification must have been made with full knowledge of all material facts. Ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent. *Tennent v. Union Mut. Life Ins. Co., 150 Va. 548, 560, 143 S.E. 705, 707 (1928).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.070
## Agent's Knowledge Binds Insurer

**An insurance company is bound by the knowledge or notice its agent received while he was acting within his authority, even if he never communicated the information to the company**[, unless the insured acted fraudulently or in bad faith; the agent had no authority to deal with the matters the notice or knowledge affected, and the insured knew or should have known this; the agent received the knowledge or notice while he was not acting as an agent, and it was not present in his mind at the time he did the act which the insured claims is binding on the company].

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hilfiger v. Transamerica Occidental Life Ins. Co., 256 Va. 265, 272, 505 S.E.2d 190, 194 (1998)*; *Reserve Life Ins. Co. v. Ferebee, 202 Va. 556, 559–60, 118 S.E.2d 675, 677–78 (1961)*; *American Liberty Ins. Co. v. Breslerman, 201 Va. 822, 826–27, 113 S.E.2d 862, 866 (1960)*; *State Farm Mut. Auto. Ins. Co. v. Miller, 194 Va. 589, 592, 74 S.E.2d 145, 147 (1953)*; *Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 345, 46 S.E.2d 377, 381 (1948)*; *Harrison v. Provident Relief Ass'n, 141 Va. 659, 668–69, 126 S.E. 696, 699 (1925)*; *Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 237, 28 S.E. 209, 211 (1897).*

### PRACTICE COMMENTARY

Many cases are available to support the general proposition that any knowledge which the agent of an insurance company may have is imputed to the company. See, e.g., *Harrison, 141 Va. at 668, 126 S.E. at 699.*

> "The insurance agent, within the general scope of the business he transacts, is *pro hac vice* the insurance company. What he knows they know. What he does they do." *Virginia Auto Mut. Ins. Co., 187 Va. at 345, 46 S.E.2d at 381.*

However, "[t]he insurer is not estopped to avoid the policy where both the applicant and the insurer's agent know that the material answers contained in the application are false." Yet, when it is shown that the answers given by the insured are "without fraud, collusion, or actual knowledge of the insured, or the existence of circumstances from which constructive knowledge of such falsity might be imputed to [the insured], the insurer cannot rely upon the falsity of such answers in seeking to avoid liability." *New York Life Ins. Co. v. Eicher, 198 Va. 255, 259–60, 93 S.E.2d 269, 272–73 (1956).* Terms such as "without fraud," "collusion," or "constructive knowledge" may require supplemental definitional instructions.

This instruction applies even if the policy contains restrictions purporting to relieve the insurer from liability for all acts done by, all notices given to, and all knowledge acquired by, their agents. *New York Life Ins. Co., 198 Va. at 259–60, 93 S.E.2d at 272–73.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.080**
**Existence of Policy: Burden of Proof**

**The plaintiff has the burden of proving the existence of the insurance policy by the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Northern Neck Mut. Fire Ass'n v. Turlington, 136 Va. 44, 53, 116 S.E. 363, 365 (1923).*

### PRACTICE COMMENTARY

The plaintiff must prove an oral contract by clear and convincing evidence. *Yates v. Whitten Valley Rental Corp., 226 Va. 436, 438, 309 S.E.2d 330, 331 (1980).* See Instruction No. 47.100, Oral Contracts and Binders.

☞ ***PRACTICE POINTER:*** The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence. See Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence. Clear and convincing evidence is defined in Instruction No. 3.110.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.090**
**Essential Elements of Insurance Contract**

**For a valid insurance contract to exist, the parties must have agreed on:**

**(1) the names of the parties to the contract;**

**(2) the subject of the insurance;**

**(3) the risks insured against;**

**(4) the time at which the insurance takes effect and the length of time it is to continue;**

**(5) the amount of the premium; and**

**(6) the conditions pertaining to the insurance.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 38.2-305.

**Case Authority:** *Autumn Ridge, L.P. v. Acordia of Virginia. Ins. Agency, Inc., 270 Va. 83, 89, 613 S.E.2d 435, 438 (2005)*; *Group Hosp. Med. Serv. v. Smith, 236 Va. 228, 230–31, 372 S.E.2d 159, 160 (1988)*; *Dickerson v. Conklin, 218 Va. 59, 66–67, 235 S.E.2d 450, 455 (1977)*; *Hayes v. Durham Life Ins. Co., 198 Va. 670, 672–73, 96 S.E.2d 109, 111 (1957)*.

## Practice Commentary

This instruction is applicable to oral contracts of insurance, *Yates v. Whitten Valley Rental Corp., 226 Va. 436, 437–38, 309 S.E.2d 330, 331 (1983)*, and to contracts of renewal, *Boone v. Standard Acc. Ins. Co., 192 Va. 672, 679, 66 S.E.2d 530, 534 (1951)*.

An insurance policy is a contract, and general contract principles such as offer, acceptance, and consideration are applicable. See Chapter 45, Contracts.

It is essential that there be an offer or proposal from one party and an acceptance by the other. The contract is usually made when the agent submits an offer or application from the insured to the insurance company and the insurance company subsequently accepts it. An insurance contract can also be made if the company offers a policy and the insured accepts it. *Boone, 192 Va. at 678–79, 66 S.E.2d at 534*.

Regardless of which party makes the offer, acceptance by the other is essential, and, unless the offer contains conditions, is sufficient to complete the contract. Before it is accepted, the offer can be withdrawn without the consent of the other party. If this happens, there can be no valid acceptance and no contract of insurance. *Boone, 192 Va. at 678–79, 66 S.E.2d at 534*; *Hayes, 198 Va. at 672–73, 96 S.E.2d at 111*; 4B M.J., *Contracts* § 23. The acceptance must be evidenced by some act that binds the party accepting. A mental resolution that can be changed is not enough. Any appropriate act that accepts the terms as they were intended to be accepted is sufficient. *Boone, 192 Va. at 679, 66 S.E.2d at 534*.

An insurance company's delay while it decides whether to accept an application is not normally an acceptance. This is true even if the agent retains the premium deposit. Evidence of a delay is relevant to the question of whether the insurer has accepted. *Hayes, 198 Va. at 673, 96 S.E.2d at 111*.

Statutory provisions such as Va. Code Ann. § 38.2-2105 are part of the insurance policy just as if they were actually set out in the policy. *Ambrose v. Acacia Mut. Life Ins. Co., 190 Va. 189, 196, 56 S.E.2d 372, 376 (1949)*. Where the statute and a policy provision conflict, the statute governs the rights and duties of the parties. *Johnson v. Windsor Ins. Co., 268 Va. 196, 200–01, 597 S.E.2d 31, 34 (2004)*; *Scholz v. Standard Acc. Ins. Co., 145 Va. 694, 704, 134 S.E. 728, 731 (1926)*.

It is legally permissible for an insurance company and an applicant to agree that an insurance policy will not take effect until the applicant pays the premium in

advance. *Peerless Ins. Co. v. Associates Fin. Servs., 218 Va. 876, 879, 241 S.E.2d 792, 794 (1978).* Where an insurance policy expressly provides that it will not take effect until the premium is paid, there can be no recovery unless, before the loss, the sum was paid or the prepayment provision was waived by the company or its agent. *Reliance Life Ins. Co. v. Gulley, 134 Va. 468, 482–83, 114 S.E. 551, 556 (1922); Oliver v. Mutual Life Ins. Co., 97 Va. 134, 140–42, 33 S.E. 536, 538–39 (1899).*

The insurer can waive its right to prepayment if it delivers a policy without requiring prepayment. *Wytheville Ins. & Banking Co. v. Teiger, 90 Va. 277, 280, 18 S.E. 195, 196 (1893).* See also Instruction Nos. 47.150, Waiver of Provisions Benefitting the Insurer; and 47.160, Estoppel to Assert Forfeiture.

If a word or phrase in an insurance policy is either capable of more than one meaning or its meaning is unclear, the jury must give that term the meaning which is most favorable to the policyholder. *Doctors Co. v. Women's Healthcare Assocs., Inc., 285 Va. 566, 573, 740 S.E.2d 523, 526 (2013); Government Empls. Ins. Co. v. Moore, 266 Va. 155, 165, 580 S.E.2d 823, 828 (2003); Ayres v. Harleysville Mut. Cas. Co., 172 Va. 383, 389, 2 S.E.2d 303, 305 (1939).* If the language is plain and clear and does not violate the law or is not inconsistent with public policy, the terms of the policy must be construed as written. *Peoples Life Ins. Co. v. Parker, 179 Va. 662, 667–68, 20 S.E.2d 485, 487 (1942); Darden v. North American Benefit Ass'n, 170 Va. 479, 482, 197 S.E. 413, 415 (1938).*

Under a group insurance policy, a certificate of insurance issued to a member of the group is not a part of the contract of insurance. Where the terms of such certificate issued to an employee of a company differed from those of the policy issued by an insurer to that company, the provisions of the master policy were held to govern. *Shenandoah Life Ins. Co. v. French, 236 Va. 427, 432, 373 S.E.2d 718, 720 (1988).*

For cases involving group insurance, title insurance, and insurance written under perpetual policies, the period which the insurance is to continue until is not an essential element, and therefore part (4) of the instruction should be removed. Va. Code Ann. § 38.2-305.

For cases involving group insurance and title insurance, the amount of the premium is not an essential element and therefore part (5) of the instruction should be removed. Va. Code Ann. § 38.2-305.

### *ALERTS:*

- The Supreme Court in *Hayes* states that an application and acceptance are prerequisites to an insurance contract. *198 Va. at 672–73, 96 S.E.2d at 111.*

- For individual insurance, Va. Code Ann. § 38.2-302 requires the insured apply for insurance or consent in writing to the insurance contract. In other words, one individual cannot take out an insurance policy on another's life without his or her knowledge or consent. *Hilfiger v. Transamerica Occidental Life Ins. Co., 256 Va. 265, 269, 505 S.E.2d 190, 192 (1998).* Two exceptions to this rule include

spouses being able to insure one another and minors being insured by persons with an insurable interest in the minor's life or by persons upon whom the minor depends for support and maintenance. Va. Code Ann. § 38.2-302(A)(1)–(2).

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.100
## Oral Contracts and Binders

**An oral contract to issue a temporary contract of insurance is valid and binding on the insurance company when it was made by an agent acting within the scope of his** [actual; apparent] **authority.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 38.2-304, 38.2-2112.

**CASE AUTHORITY:** *First Prot. Life Ins. Co. v. Compton, 230 Va. 166, 169–70, 335 S.E.2d 262, 264–65 (1985)*; *Dickerson v. Conklin, 218 Va. 59, 235 S.E.2d 450 (1975)*; *Elliott v. Interstate Life & Acci. Ins. Co., 211 Va. 240, 244–45, 176 S.E.2d 314, 317 (1970)*; *Bituminous Cas. Corp. v. Baldwin, 196 Va. 1020, 1025, 86 S.E.2d 836, 839 (1955)*; *Peoples Life Ins. Co. v. Parker, 179 Va. 662, 666–67, 20 S.E.2d 485, 486 (1942)*; *Eastern Shore of Virginia Fire Ins. Co. v. Kellam, 159 Va. 93, 103, 165 S.E. 637, 640 (1932)*.

### PRACTICE COMMENTARY

For a parol contract of insurance to be valid, the parties must have intended to make the contract effective as of the present rather than in the future. *Zurich Gen. Accident & Liab. Ins. Co. v. Baum, 159 Va. 404, 412, 165 S.E. 518, 520 (1932)*.

Temporary insurance contracts and oral and written binders are valid only until a written contract is executed, but not for more than sixty days. See Va. Code Ann. § 38.2-304(B) for exceptions to this limitation.

☞ ***PRACTICE POINTER:*** The plaintiff must prove the existence of an oral contract by clear and convincing evidence. *Yates v. Whitten Valley Rental Corp., 226 Va. 436, 438, 309 S.E.2d 330, 331 (1983)*. The burden of proof on damages, however, is still the greater weight of the evidence. See Instruction No. 9.010 Reasonable Proof of Damages.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.110
## Inception of Insurance Contract

**When coverage begins under an insurance policy depends upon what the parties agreed to as the starting date and not upon when the premiums were paid.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Boone v. Standard Accident Ins. Co., 192 Va. 672, 682–83, 66 S.E.2d 530, 536 (1951).*

### PRACTICE COMMENTARY

To create a contract of insurance, there must be an offer or proposal by one party and an acceptance by the other. In order to bind an insurance company, the offer to renew a policy must be accepted before a loss under the policy has occurred. *Boone, 192 Va. at 679–80, 66 S.E.2d at 534–35.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.120
## Cancellation by Insurer: Burden of Proof

**An insurance company must conform strictly to the provisions for cancellation of its policy. When an insurance company relies on cancellation of the policy as a defense to the policyholder's claim, the insurance company has the burden of proving cancellation by the greater weight of the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Depending on the type of coverage, cancellation may be governed by other statutory provisions. See, e.g., Va. Code Ann. § 38.2-2114 (fire), Va. Code Ann. § 38.2-2208, Va. Code Ann. § 38.2-2212 (motor vehicles), and Va. Code Ann. § 38.2-3504 (accident and sickness).

**CASE AUTHORITY:** *Gregory v. Providence Wash. Ins. Co., 214 Va. 134, 136, 198 S.E.2d 616, 618 (1973)*; *National Union Fire Ins. Co. v. Dixon, 206 Va. 568, 571, 145 S.E.2d 187, 190 (1965)*; *Wolonter v. United States Cas. Co., 126 Va. 156, 166, 101 S.E. 58, 61 (1919).*

### PRACTICE COMMENTARY

When the company relies on cancellation by an agent, the company must prove that the authority that had been vested in the agent included the authority to cancel the policy and to give effective notice of such cancellation. *National Union Fire Ins. Co., 206 Va. at 571, 145 S.E.2d at 190.*

The parties to an insurance policy can do away with the element of receipt of notice by providing that the mailing of a notice is sufficient. Where the determining factor is the mailing rather than the receipt, all the insurance company needs to prove is that the letter was properly addressed and that it complied with the cancellation provision in the policy. *Ampy v. Metropolitan Cas. Ins. Co., 200 Va. 396, 401, 105 S.E.2d 839, 844 (1958)*; *Wolonter, 126 Va. at 166, 101 S.E. at 61.*

Under the Workers' Compensation Act, an insurer who wishes to cancel or not renew a policy is required to provide notice to the Virginia Workers' Compensation Commission before a policy can be terminated. Va. Code Ann. § 65.2-804(B). Where the insurer offers to renew the plan but the company fails to pay the premiums, the company and not the insurer caused the policy to expire and therefore no notice is required. *Travelers Prop. Cas. Co. of America v. Ely, 276 Va. 339, 345, 666 S.E.2d 523, 527 (2008).*

☞ ***PRACTICE POINTER:*** Whether the policy provision for cancellation was complied with may be a question of law. *Riddick v. State Capital Ins. Co., 271 F.2d 641, 642 (4th Cir. 1959).*

### ***ALERTS:***

- The company will have to prove that it complied with pertinent statutory provisions since statutes are part of the policy. *Motley v. Regal Ins. Co., 245 Va. 97, 99, 425 S.E.2d 506, 508 (1993)*; *Gregory, 214 Va. at 136, 198 S.E.2d at 618*; *Ambrose v. Acacia Mut. Life Ins. Co., 190 Va. 189, 196, 56 S.E.2d 372, 376 (1949).*

- Cancellation by mutual agreement may be valid even if the insurance company does not strictly comply with the cancellation provision. *Prillaman v. Century Indem. Co., 49 F. Supp. 197, 201 (W.D. Va. 1943), aff'd, 138 F.2d 821, 823 (4th Cir. 1943).*

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2
MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.125
## Renewal Policy: Acceptance

**The insured must accept an insurance company's offer to renew an insurance policy before the renewal becomes effective as an insurance policy. The insured may accept by an express act or by implication from a course of dealing between the insurance company and the insured. The insured must have accepted the offer to renew before the loss that gave rise to the claim occurred.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Boone v. Standard Accident Ins. Co., 192 Va. 672, 679–80, 66 S.E.2d 530, 534–35 (1951).*

### PRACTICE COMMENTARY

"The acceptance of a proposal for insurance must be evidenced by some act that binds the party accepting. A mental resolution, that can be changed, is not sufficient. Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the insurer, is sufficient to show the concurrence of the parties, the meeting of minds." *Boone, 192 Va. at 679, 66 S.E.2d at 534* (quoting Cooley's Briefs on Insurance, 2d Ed. Vol. 1, p. 587). When acceptance cannot be implied, acceptance "will not be presumed from a mere failure to decline a proposal." *Id. at 680, 66 S.E.2d at 535.*

Usually the acceptance, whether express or implied, will involve the insured and the insurer's agent. See Instruction Nos. 47.020, Agent for Insurer, 47.030, Agent's Acts Bind Insurer, 47.040, Apparent Authority, 47.050, Limits on Agent's Authority Unknown to Insured, 47.060, Ratification of Agent's Unauthorized Acts, and 47.070, Agent's Knowledge Binds Insurer.

There may be cases where using "insured" in the instruction will suggest that the plaintiff was indeed insured when that is actually an issue for the jury. If that is so, you should substitute the party's name or designation.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.130**
**Recovery Under the Policy: Burden of Proof**

**The burden is on the insured to prove by the greater weight of the evidence that the loss occurred while the policy was in force.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Aetna Cas. & Sur. Co. v. Goldman, 217 Va. 419, 420, 229 S.E.2d 863, 864 (1976).*

### PRACTICE COMMENTARY

The *Goldman* Court held that an insured fails to meet her burden if she merely proves it "equally probable" that the loss occurred before, rather than after, the effective date of the insurance policy. *Goldman, 217 Va. at 420, 229 S.E.2d at 864.*

☞ ***PRACTICE POINTER:*** Greater weight of the evidence is defined in Instruction No. 3.100.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.140**
**Defense to Liability: Loss Not Covered**

**If the insurance company denies liability on the basis that the loss is excluded by the terms of the policy, it bears the burden of proof on that issue.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Bituminous Cas. Corp. v. Sheets, 239 Va. 332, 336, 389 S.E.2d 696, 698 (1990)*; *State Farm Mut. Auto. Ins. Co. v. Long, 212 Va. 234, 236, 183 S.E.2d 138, 139 (1971)*; *White v. State Farm Mut. Auto. Ins. Co., 208 Va. 394, 396, 157 S.E.2d 925, 927 (1967)*; *Dressler v. Reserve Life Ins. Co., 200 Va. 689, 692, 107 S.E.2d 406, 408 (1959).*

### PRACTICE COMMENTARY

Whether the loss is covered will generally be a question for the judge on the construction of the contract. *Virginia Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75, 80, 677 S.E.2d 299, 302 (2009)* (discussing how the interpretation of an insurance policy presents a question of law).

Exclusions in insurance policies must be read narrowly in favor of coverage. *Allstate Ins. Co. v. Gauthier, 273 Va. 416, 420, 641 S.E.2d 101, 104 (2007).* The scope of the exclusion must be defined clearly and unambiguously in the policy. *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch., 293 Va. 331, 336, 798 S.E.2d 170, 173 (2017).*

☞ ***PRACTICE POINTER:*** This instruction should be used with Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.150
## Waiver of Provisions Benefitting the Insurer

**A waiver is an intentional or voluntary abandonment of a known right. A waiver may be express or it may be inferred from acts of the party. There are two factors that must be present to find a waiver. The first is knowledge of the facts that give rise to the right. The second is the intention, based upon this knowledge, to relinquish that right.**

**The policyholder must prove waiver by the insurance company by the greater weight of the evidence.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Employers Com. Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 412–13, 200 S.E.2d 560, 562 (1973)*; *Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 347–49, 46 S.E.2d 377, 382–84 (1948)*; *Woodmen of World Life Ins. Soc'y v. Grant, 185 Va. 288, 299, 38 S.E.2d 450, 454 (1946)*; *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 432–33, 46 S.E. 463, 464 (1904)*; *McLean v. Piedmont & Arlington Life Ins. Co., 70 Va. (29 Gratt) 361, 372 (1877)*; *Georgia Home Ins. Co. v. Kinnier, 69 Va. (28 Gratt) 88, 109 (1877)*.

## Practice Commentary

A right or defense cannot be waived without knowledge that the right or defense exists. *Lumbermens Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932, 938 (W.D. Va. 1968), aff'd, 406 F.2d 836 (4th Cir. 1969)*; *North River Ins. Co. v. Belcher, 155 Va. 588, 608–09, 155 S.E. 699, 705–06 (1930)*. See Instruction No. 47.070, Agent's Knowledge Binds Company.

Before the policy is issued, an agent may waive provisions of it unless the insured actually knows of limits on the agent's authority. Once the policy is issued, a waiver is not effective if the policy contains limitations on the agent's authority, because the insured is held to the terms of his or her policy. See Instruction No. 47.050, Limits on Agent's Authority Unknown to Insured. General agents can waive forfeitures and conditions in the policy, including provisions prohibiting waiver, without communicating the waiver to their companies. *Brillhart, 187 Va. at 348, 46 S.E. at 383; Richmond Mica Co., 102 Va. at 437–39, 46 S.E. at 466*. A general agent may also waive the requirements of a clause. See, e.g., *Columbia Fire Ins. Co. v. Boykin & Tayloe, Inc., 185 F.2d 771, 775–77 (4th Cir. 1950)* (discussing waiver of a value reporting clause); *State Farm Fire Ins. Co. v. Rakes, 188 Va. 239, 247–48, 49 S.E.2d 265, 269 (1948)* (discussing provisions relating to the location of property at a specified place); *Hanover Fire Ins. Co. v. Drake, 170 Va. 257, 266, 196 S.E. 664, 666 (1938)* (reviewing provisions pertaining to proof of loss); *Bryant v. Cont'l Life Ins. Co., 168 Va. 585, 590–91, 192 S.E. 581, 583 (1937)* (concerning a payment of premiums provision); *N.Y. Life Ins. Co. v. Barton, 166 Va. 426, 436–38, 186 S.E. 65, 70 (1936)* (same); 10A M.J., Insurance §§ 34–36; 43 Am. Jur. 2d Insurance § 530.

A waiver of a forfeiture need not be founded on new consideration. *Georgia Home Ins. Co. v. Kinnier, 69 Va. (28 Gratt.) 88, 109–10 (1877)*. If there is no new consideration for the waiver, however, the insured must have relied on the waiver to such a degree that it would be inequitable to permit the company to disavow its action. *Coleman Furniture Corp. v. Home Ins. Co., 4 F. Supp. 794, 798 (W.D. Va.), aff'd, 67 F.2d 347 (4th Cir. 1933)*. Forfeitures are not favored; courts are "always on the alert to take advantage of any circumstances that indicate an election to waive a forfeiture . . . ." *Home Beneficial Ass'n v. Field, 162 Va. 63, 68–69, 173 S.E. 370, 373 (1934)*. See also *Farmers' Benevolent Fire Ins. Ass'n, 101 Va. 236, 241, 43 S.E. 338, 339*. Once the insurer has waived a right to rely on a forfeiture,

the right cannot be revived. *Hartford Fire Ins. Co. v. Mutual Sav. & Loan Co., 193 Va. 269, 276, 68 S.E.2d 541, 545 (1952)*; *Farmers' Benevolent Fire Ins. Ass'n, 101 Va. at 242, 43 S.E. at 339.*

### ***ALERTS:***

- Knowledge of the existence of a breach of the insurance policy provisions does not constitute a waiver. There must also be some positive act upon which a waiver can be predicated. *Foreman v. German Alliance Ins. Ass'n, 104 Va. 694, 699, 52 S.E. 337, 338 (1905).* However, as the instruction notes, the key elements of waiver are knowledge and intent. The Supreme Court of Virginia has recognized the possibility of waiver by silence. See *Farmers' Benevolent Fire Ins. Ass'n v. Kinsey, 101 Va. 236, 243, 43 S.E. 338, 340 (1903).* For a case parsing the distinction between waiver and estoppel, see *Employers Com. Union Ins. Co., 214 Va. at 412–13, 200 S.E. at 562.* See Instruction No. 47.160, Estoppel to Assert Forfeiture.

- A waiver by the insurer will not legalize an insurance contract where no insurable interest is involved. *Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 191, 10 S.E.2d 518, 522 (1940).*

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.160
## Estoppel to Assert Forfeiture

**An insurance company or its agent with knowledge that the insured has breached a condition in the policy may say or do something that leads the insured to believe that his policy will not be forfeited. If the insured relies in good faith on this belief, the insurer cannot assert a forfeiture of the policy. The burden is on the insured to prove by clear, precise, and unequivocal evidence that the company or its agent knew of the breach of a condition of the policy, that the company or its agent did or said something that led the insured to believe that the policy would not be forfeited, and that the insured in good faith relied on that conduct of the company.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Harris v. Criterion Ins. Co., 222 Va. 496, 502, 281 S.E.2d 878, 881 (1981)*; *Employers Com. Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 414–15, 200 S.E.2d 560, 564 (1973)*; *White v. Nationwide Mut. Ins. Co., 245 F. Supp. 1, 6 (W.D. Va. 1965), aff'd, 361 F.2d 785 (4th Cir. 1966).*

### PRACTICE COMMENTARY

This instruction does not contain the usual detrimental reliance language because usually the detriment to the insured is too obvious to be an issue. If it is not obvious, add "to his or her detriment" after "good faith" in the last sentence of the instruction.

The doctrines of waiver and estoppel are often confused, yet there are meaningful distinctions between the two. For one, waiver is a doctrine at law, whereas estoppel is an equitable doctrine. Furthermore, waiver requires knowledge of a right and an intention to relinquish that right. Estoppel, however, does not require any intent on the part of the party so charged. Rather, in estoppel the knowledge of the right may be presumed when the facts are such as to put a reasonably prudent person upon inquiry and prompt him or her to pursue the inquiry and acquire knowledge. Finally, under the doctrine of "estoppel by inconsistent positions," one who has, with knowledge of the options open to him or her, elected to assume one position is estopped from later assuming an inconsistent position to the detriment of someone who has relied upon his or her first position. *Employers Commercial Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 412–13, 200 S.E.2d 560, 562–63 (1973)*; see *Thrasher v. Thrasher, 210 Va. 624, 628, 172 S.E.2d 771, 773 (1970).* But see *Maxey v. Doe, 217 Va. 22, 25–26, 225 S.E.2d 359, 361–62 (1976)* (holding that the doctrine of estoppel by inconsistent positions did not apply when an insurer lacked knowledge of the available options).

### *ALERTS:*

- The Supreme Court of Virginia has said that the party relying on estoppel has the burden of proving each element by "clear, precise and unequivocal evidence." *Woodward v. Resource Bank, 246 Va. 481, 489, 436 S.E.2d 613, 618 (1993)*; *Pennsylvania Cas. Co. v. Simopoulos, 235 Va. 460, 465, 369 S.E.2d 166, 169 (1988)*; *Harris v. Criterion Ins. Co., 222 Va. 496, 502, 281 S.E.2d 878, 881 (1981)*; *Employers Commercial Union Ins. Co., 214 Va. at 415, 200 S.E.2d at 564*; *John Hancock Mut. Life Ins. Co. v. Virginia Nat'l Bank, 212 Va. 31, 33, 181 S.E.2d 618, 620 (1971)*; *Utica Mut. Ins. Co. v. National Indem. Co., 210 Va. 769, 773, 173 S.E.2d 855, 858 (1970).*

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.170
## Issuing Policy With Knowledge of Breach

**If an insurance company or its agent knew facts which would have rendered the policy invalid and the company nevertheless issued the policy, then it cannot deny liability under the policy unless the insured acted in bad faith. "Bad faith" means the insured acted either dishonestly or with the intent to defraud the insurance company.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Maryland Cas. Co. v. Craig, 213 Va. 660, 664–65, 194 S.E.2d 729, 732 (1973)*; *Ruffin v. United States Fire Ins. Co., 208 Va. 463, 464, 158 S.E.2d 672, 673–74 (1968)*; *Home Beneficial Ass'n v. Field, 162 Va. 63, 69–70, 173 S.E. 370, 373 (1934)*; *Westchester Fire Ins. Co. v. Rose, 159 Va. 633, 640, 166 S.E. 469, 472 (1932)*; *North River Ins. Co. v. Belcher, 155 Va. 588, 609–10, 155 S.E. 699, 706 (1930)*; *North River Ins. Co. v. Lewis, 137 Va. 322, 329, 119 S.E. 43, 45 (1923)*; *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 432, 46 S.E. 463, 464 (1904)*; *Georgia Home Ins. Co. v. Kinnier, 69 Va. (28 Gratt.) 88, 109 (1877)*.

### PRACTICE COMMENTARY

The following language can be used if the waiver or estoppel is premised on accepting premiums rather than on issuing the policy:

> If an insurance company or its agent learned of a breach of a provision in a policy after it issued the policy and if it continued to accept premiums from the insured, the company cannot now claim that the policy is invalid because of the breach unless the insured acted in bad faith, that is, dishonestly or with the intent to defraud the company.

### *ALERTS:*

- If the insurer issues a policy with knowledge of a breach of a provision in the policy, it is estopped from relying upon that particular breach as a defense. Issuing the policy does not constitute a waiver of the provision nor does it estop the insurer from relying on it. It only estops the insurer from claiming that the facts it knew constituted a breach. If there are other facts that the insurer did not know, and if those facts independently constituted a breach, neither waiver nor estoppel applies to those facts. *North River Ins. Co., 155 Va. at 608–09, 155 S.E. at 705*.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.180**
**Proof of Loss or Waiver**

**An insured must prove by the greater weight of the evidence either that he complied with the requirements of the policy as to proof of loss or that the insurance company waived compliance.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 38.2-314, 38.2-320, 38.2-2105, 38.2-2226.

**CASE AUTHORITY:** *Allstate Ins. Co. v. Charity, 255 Va. 55, 58, 496 S.E.2d 430, 431 (1998)*; *Aetna Cas. & Sur. Co. v. Harris, 218 Va. 571, 578, 239 S.E.2d 84, 88 (1977)*; *Seaboard Fire & Marine Ins. Co. v. Hurst, 186 Va. 21, 26, 41 S.E.2d 495, 497 (1947)*; *Hanover Fire Ins. Co. v. Drake, 170 Va. 257, 262–63, 196 S.E. 664, 666 (1938)*; *Georgia Home Ins. Co. v. Goode & Co., 95 Va. 751, 754–55, 30 S.E. 366, 367–68 (1898).*

### PRACTICE COMMENTARY

"A distinct denial of liability, and refusal to pay, on the ground that there is no contract, or there is no liability, is a waiving of the condition requiring proof of loss." *Provident Life & Acci. Ins. Co. v. Nicholson, 157 Va. 345, 352, 160 S.E. 5, 7 (1931).*

### *ALERTS:*

- When the policy requires the proof of loss to be filed within a specified time, all time spent trying to adjust the claim tolls the time for submitting the proof of loss. Va. Code Ann. § 38.2-314. Va. Code Ann. § 38.2-320 does not change the rule adopted in *North British & Mercantile Ins. Co. v. Edmundson, 104 Va. 486, 492, 52 S.E. 350, 352 (1905)*, that failure to file proof of loss within the time specified in the policy does not bar an action on the policy if the proof of loss is filed before suit is brought, or at least 60 days before the statute of limitations runs. *Southern Home Ins. Co. v. Bowers, 157 Va. 686, 694–95, 161 S.E. 914, 917 (1932).*

- An insured shall be entitled to recover costs and reasonable attorney fees if the insurer did not act in good faith in denying coverage or refusing to make payment under the policy. Va. Code Ann. § 38.2-209(A). However, the determination whether the insurer acted in bad faith is made by the judge. *REVI, LLC v. Chicago Title Ins. Co., 290 Va. 203, 214, 776 S.E.2d 808, 814 (2015).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.190
## Effect of Proof of Loss on Recovery at Trial

**An insured cannot recover more than the amount stated in the proof of loss unless he proves by the greater weight of the evidence that the additional amounts he now claims were omitted under a misapprehension, mistake, or in ignorance of material facts that he learned after submitting the proof of loss.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Lavenstein Bros. v. Hartford Fire Ins. Co., 125 Va. 191, 220–21, 101 S.E. 331, 340–41 (1919)*; *North British & Mercantile Ins. Co. v. Nidiffer, 112 Va. 591, 595–96, 72 S.E. 130, 132 (1911)*; *Metropolitan Life Ins. Co. v. Rutherford, 98 Va. 195, 197–98, 35 S.E. 361, 362 (1900).*

### PRACTICE COMMENTARY

Misstatements in the proof of loss will not keep an insured from recovering unless they were made intentionally or without any attempt to investigate the truth of a matter that the insured has no reasonable grounds for including in the claim. *Nidiffer, 112 Va. at 595–96, 72 S.E. at 132.*

To prevent a recovery on a fire policy under a clause against false swearing, an overvaluation must be material and must have been knowingly and intentionally made. *Globe & Rutgers Fire Ins. Co. v. Stallard, 68 F.2d 237, 241 (4th Cir. 1934).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.200
## Notice to Insurer: Reasonable Time

**The requirement in the policy that notice of the** [accident; injury; loss] **be given** [immediately; at once; forthwith; as soon as practicable; as soon as possible] **means that notice must be given within a reasonable time from the date of the** [accident; injury; loss] **under all of the circumstances of the case. It does not mean that notice must be given immediately or instantaneously. If there is a reasonable explanation for the insured's delay in notifying the insurance company, the insured is not barred from a recovery because of the delay.**

**The insurance company has the burden of proving by the greater weight of the evidence that notice of the** [accident; injury; loss] **was not given within a reasonable time under all of the circumstances.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 38.2-2105, 38.2-3503.

**Case Authority:** *Dabney v. Augusta Mut. Ins. Co., 282 Va. 78, 87–88, 710 S.E.2d 726, 731–32 (2011)*; *Osborne v. National Union Fire Ins. Co., 251 Va. 53, 56, 465 S.E.2d 835, 837 (1996)*; *State Farm Fire & Cas. Co. v. Walton, 244 Va. 498, 504–05, 423 S.E.2d 188, 192 (1992)*; *State Farm Fire & Cas. Co. v. Scott, 236 Va. 116, 120, 372 S.E.2d 383, 385 (1988)*; *Lord v. State Farm Mut. Auto. Ins. Co., 224 Va. 283, 284, 295 S.E.2d 796, 797 (1982)*; *Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 323–24, 288 S.E.2d 469, 473 (1982)*; *Erie Ins. Exch. v. Meeks, 223 Va. 287, 290, 288 S.E.2d 454, 456 (1982)*; *State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 597, 272 S.E.2d 196, 198–99 (1980)*; *Yanago v. Aetna Life Ins. Co., 164 Va. 258, 265–66, 178 S.E. 904, 906 (1935)*; *Northwestern Nat'l Ins. Co. v. Cohen, 138 Va. 177, 183–84, 121 S.E. 507, 509–10 (1924)*; *Wooddy v. Old Dominion Ins. Co., 72 Va. (31 Gratt.) 362, 376 (1879)*.

### Practice Commentary

This instruction has extensive case support in Virginia. The phrases that have been construed in accordance with the instruction include notice "as soon as practicable," *Scott, 236 Va. at 120, 372 S.E.2d at 385*; "immediate" notice, *Yanago, 164 Va. at 265–66, 178 S.E. at 906*; notice "forthwith," *Northwestern Nat'l Ins. Co., 138 Va. at 184, 121 S.E. at 509–10*; and notice to be immediately given, *Wooddy, 72 Va. (31 Gratt) at 376*.

The reasonableness of the delay is a question for the jury "when the facts are disputed or the inferences are uncertain, or when there are extenuating circumstances for the delay; but when the facts are undisputed and certain, the question becomes one of law for the court." *State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 268, 148 S.E.2d 775, 777 (1966)*; *Mason & Dixon Lines, Inc. v. United States Cas. Co., 199 Va. 221, 225, 98 S.E.2d 702, 705 (1957)*; *Northwestern Nat'l Ins. Co., 138 Va. at 184, 121 S.E. at 509–10*.

Among the various circumstances bearing on reasonableness that the Court has considered are the age and capacity for understanding of the insured, *North River Insurance Co. v. Gourdine, 205 Va. 57, 62–63, 135 S.E.2d 120, 124 (1964)*; the insured's poor physical condition resulting from the accident, *Glens Falls Indemnity Co. v. Harris, 168 Va. 438, 443–44, 191 S.E.644, 646–47 (1937)*; *Swann v. Atlantic Life Insurance Co., 156 Va. 852, 862, 159 S.E. 192, 195 (1931)*; and the belief that the injured party would not sue, *Lumbermens Mutual Casualty Co. v. Harleysville Mutual Casualty Co., 287 F. Supp. 932, 938–39 (W.D. Va. 1968), aff'd, 406 F.2d 836 (4th Cir. 1969)*.

The duty of the insured to give notice also applies to an assigned risk policy. *Scott, 236 Va. at 120–21, 372 S.E.2d at 385–86* (upholding a jury finding that notice was timely when the insured sent notice to the insurer approximately ten weeks after the accident); *Liberty Mut. Ins. Co., 223 Va. at 324, 288 S.E.2d at 473* (holding that a 51-day delay in notice was unreasonable and a breach of the policy

conditions); *Lord, 224 Va. at 288, 295 S.E.2d at 799–800* (applying this notice requirement and affirming a trial court holding that a 173-day delay barred recovery).

### *ALERTS:*

- See generally the ***Alerts*** for Instruction No. 47.180, Proof of Loss or Waiver.

- Where the insured fails to cooperate with the insurer, the insurer must show prejudice. The insurer must also show prejudice where it has actual notice of a motion for judgment served on its insured and the insured has failed to turn such papers over to the insurers. Va. Code Ann. § 38.2-2204(D). However, when an insured fails to comply with a policy provision requiring timely notice of an accident, the insurer is not required to show it was prejudiced by such failure. *Osborne, 251 Va. at 56, 465 S.E.2d at 837.* A negligent delay or failure to give notice is not sufficient to establish a "refusal" to give notice. *Craig v. Dye, 259 Va. 533, 539, 526 S.E.2d 9, 13 (2000).*

- The company may not rely on a breach of condition by its insured unless the company has notified the claimant within 45 days after discovery of the breach or of the claim, whichever is later. Va. Code Ann. § 38.2-2226.

- Where the insurer shows that the insured's willful failure to appear at the original trial deprived the insurer of evidence which would have made a jury issue of the insured's liability and supported a verdict in his favor, the insurer has established a reasonable likelihood the result would have been favorable to the insured and has carried its burden of proving prejudice under Va. Code Ann. § 38.2-2204. *State Farm Mut. Auto. Ins. Co. v. Davies, 226 Va. 310, 316, 310 S.E.2d 167, 170 (1983).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.210**
**Untrue Statements in Application**

**If you find from the evidence that the insurance company has clearly proved:**

(1) **that the insured** [made the statement; gave the answer] **in the application for the policy; and**

(2) **that the** [statement; answer] **was untrue when made; and**

(3) **that the untruthful** [statement; answer] **reasonably influenced the company's decision to issue the policy;**

**then you shall find your verdict in favor of the insurance company.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 38.2-309.

**CASE AUTHORITY:** *Portillo v. Nationwide Mut. Fire Ins. Co., 277 Va. 193, 196, 671 S.E.2d 153, 155 (2009)*; *Montgomery Mut. Ins. Co. v. Riddle, 266 Va. 539, 543, 587 S.E.2d 513, 515 (2003)*; *Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 42, 540 S.E.2d 491, 493 (2001)*; *Time Ins. Co. v. Bishop, 245 Va. 48, 52, 425 S.E.2d 489, 492 (1993)*; *Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 713, 250 S.E.2d 352, 355–56 (1979)*; *Harrell v. North Carolina Mut. Life Ins. Co., 215 Va. 829, 831–32, 213 S.E.2d 792, 794–95 (1975)*; *Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 772–73, 195 S.E.2d 854, 856 (1973)*; *United States Fid. & Guar. Co. v. Haywood, 211 Va. 394, 397–98, 177 S.E.2d 530, 532–33 (1970)*; *Mutual of Omaha Ins. Co. v. Echols, 207 Va. 949, 953–54, 154 S.E.2d 169, 172 (1967)*; *Chitwood v. Prudential Ins. Co., 206 Va. 314, 318, 143 S.E.2d 915, 918 (1965).*

## PRACTICE COMMENTARY

Misrepresentation is an affirmative defense. Whether a representation has been made and, if so, its terms, are questions of fact. When a misrepresentation is proven, its materiality is a question of law for the court. *Harrell, 215 Va. at 831–32, 213 S.E.2d at 794–95*. If the court decides that the facts were not material, then it should not allow this defense.

A misstatement is material if the fact misstated would reasonably influence the company's decision to issue a policy. *Dingus, 219 Va. at 713, 250 S.E.2d at 355*; see Instruction No. 39.020, Definition of Material Fact.

There is also case law in Virginia on the effect of ambiguity or uncertainty on the truthfulness of responses. See, e.g., *Andrews v. American Health & Life Ins. Co., 236 Va. 221, 224, 372 S.E.2d 399, 401 (1988)* (construing an ambiguous contract term against the insurance company).

However, if the insured gives truthful information but the agent incorrectly or falsely fills out the application, the insured will not be barred from recovering under the policy. *Gilley v. Union Life Ins. Co, 194 Va. 966, 973–74, 76 S.E.2d 165, 168–70 (1953)*. See Instruction No. 47.220, Answers Recorded by Agent. If a question in an application is left unanswered or is answered imperfectly, and the insurance company issues a policy based on the application without making further inquiries, the company cannot rely on the omission or imperfection to avoid its liability under the policy. *Williams v. Metropolitan Life Ins. Co., 139 Va. 341, 345–47, 123 S.E. 509, 511 (1924)*.

If there is no application and if there is ample opportunity for the agent to ask all necessary questions, the company may not avoid liability because of the insured's failure to volunteer information if he or she answered every question fairly and honestly. *Franklin Fire Ins. Co. v. Bolling, 173 Va. 228, 236, 3 S.E.2d 182, 185 (1939)*; *Williams v. Metropolitan Life Ins. Co., 139 Va. 341, 345–47, 123 S.E. 509, 511 (1924)*; *North River Ins. Co. v. Lewis, 137 Va. 322, 327–28, 119 S.E.*

*43, 45 (1923)*. But see *Maryland Cas. Co. v. Cole, 156 Va. 707, 715–16, 158 S.E. 873, 876 (1931)*; *North River Ins. Co. v. Belcher, 155 Va. 588, 608–09, 155 S.E. 699, 705–06 (1930)*; *Virginia Fire & Marine Ins. Co. v. Lennon, 140 Va. 766, 795, 125 S.E. 801, 809 (1924)*; *Virginia Fire & Marine Ins. Co. v. J.I. Case Threshing Mach. Co., 107 Va. 588, 590–91, 59 S.E. 369, 369–70 (1907)*.

In *Portillo v. Nationwide Mut. Fire Insurance Co.*, the Supreme Court of Virginia upheld a trial court verdict that found an automobile insurance policy to be void for a material misrepresentation on the application, where the insurance company representative testified that if the full facts had been disclosed on the application the company would have charged a higher premium. *277 Va. at 197, 671 S.E.2d at 155*.

☞ ***PRACTICE POINTER:*** These same rules apply even if the insurance company does not require a written application. *Greensboro Nat'l Life Ins. Co. v. Southside Bank, 206 Va. 263, 268–69, 142 S.E.2d 551, 555–56 (1965)*; see also *Smith v. Colonial Ins. Co. of Cal., 258 Va. 30, 33–34, 515 S.E.2d 775, 777 (1999)* (concerning oral and written representations made during the application process in the context of the parol evidence rule).

### ***ALERTS:***

- If the application only requires the statements to be correct to the best of the applicant's knowledge, then the insurer must clearly prove that the applicant's answer was knowingly false. *Bales, 213 Va. at 772–73, 195 S.E.2d at 856*.

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.220
## Answers Recorded by Agent

**If an insurance company clearly proves that an answer in the application was untrue when made then there is a presumption that the insured knew the answer was false and the burden shifts to the insured to come forward with evidence to prove that the answer was truthfully given by him and falsely recorded by the agent.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Time Ins. Co. v. Bishop, 245 Va. 48, 52, 425 S.E.2d 489, 491 (1993)*; *Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 713, 250 S.E.2d 352, 355 (1979)*; *N.Y. Life Ins. Co. v. Eicher, 198 Va. 255, 260, 93 S.E.2d 269, 273–74 (1956)*; *Gilley v. Union Life Ins. Co., 194 Va. 966, 974, 76 S.E.2d 165, 170 (1953).*

### PRACTICE COMMENTARY

Ordinarily, clear proof of the mere falsity of the statements made by an insured is all that is required. But if the policy provides that an applicant's answers must be correct to the best of his knowledge, the insurer must prove that the answer was knowingly false. *Old Republic Life Ins. v. Bales, 213 Va. 771, 195 S.E.2d 854 (1973).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.500
## Definition of Accidental

**An injury is accidental if it takes place unexpectedly, by chance, or not according to the usual course of things.**

[An accident is an event which creates an effect that is not the natural and probable consequence of means employed and is not intended, designed, or reasonably anticipated.]

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *AES Corp. v. Steadfast Ins. Co., 283 Va. 609, 617–18, 725 S.E.2d 532, 536 (2012)*; *Harris v. Bankers Life & Cas. Co., 222 Va. 45, 46, 278 S.E.2d 809, 810 (1981)*; *Travelers Indem. Co. v. Obenshain, 219 Va. 44, 47, 245 S.E.2d 247, 249 (1978)*; *Norman v. Insurance Co. of N. America, 218 Va. 718, 723, 239 S.E.2d 902, 905 (1978)*; *Tanner v. Life Ins. Co., 217 Va. 218, 220–21, 227 S.E.2d 693, 694–95 (1976)*; *American Nat'l Ins. Co. v. Dozier, 172 Va. 376, 379–80, 2 S.E.2d 282, 283 (1939)*; *Ocean Accident & Guarantee Corp., Ltd. v. Glover, 165 Va. 283, 285, 182 S.E. 221, 222 (1935).*

### Practice Commentary

Where "accident" is not defined in the insurance policy, the Supreme Court of Virginia has defined "accident" as "an event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." *Ocean Accident, 165 Va. at 285, 182 S.E. at 222*; see also *Harris, 222 Va. at 46, 278 S.E.2d at 810.*

This instruction covers both the definitions of "accidental injury" and "accident." While the definitions of "accidental injury" and "accident" are different and should not be used interchangeably, the terms "accident" and "occurrence" are synonymous and refer to an incident that was unexpected from the standpoint of the uninsured. *AES Corp., 283 Va. at 617–18, 752 S.E.2d at 536.*

Even though the action that started the chain of events was intentionally performed, the results may still be accidental under the terms of an insurance policy if the injury results from an unforeseen cause that is out of the ordinary expectations of a reasonable person. The dispositive issue is not whether the action taken was intended, but whether the resulting harm was reasonably anticipated or the natural or probable consequence of the intentional act. *AES Corp., 283 Va. at 618, 725 S.E.2d at 536.*

In *Norman*, the policy covered liability for an "occurrence" which was defined as an accident resulting in injury "neither expected nor intended from the standpoint of the Insured." The Supreme Court of Virginia held that an intentional battery of a person cannot be converted into an accident by the statement of the insured that he or she did not intend the injury. *218 Va. at 723, 239 S.E.2d at 905.*

### *ALERTS:*

- If the policy defines "accident" or "accidental," then the policy definition should be incorporated in an instruction or substituted for the language of this instruction.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 10.6, 13.7, 21.8

Kent Sinclair, Virginia Remedies § 39-2

Michie's Jurisprudence, Insurance §§ 6 through 68

**Instruction No. 47.510**
**Accident: Insured the Aggressor**

**If an insured voluntarily provokes, or is the aggressor in, an encounter when he knows, or reasonably should know, that he will be in danger of bodily injury as the natural or probable consequence of his act, then his injury in the encounter is not accidental.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Tucker v. Life Ins. Co. of Virginia, 228 Va. 55, 59–60, 321 S.E.2d 78, 81 (1984)*; *Harris v. Bankers Life & Cas. Co., 222 Va. 45, 47, 278 S.E.2d 809, 810 (1981)*; *Byrd v. Life Ins. Co., 219 Va. 824, 828, 252 S.E.2d 307, 309–10 (1979)*; *Citizens Home Ins. Co. v. Nelson, 218 Va. 216, 218–19, 237 S.E.2d 100, 101–02 (1977)*; *Life & Cas. Ins. Co. v. Daniel, 209 Va. 332, 341–42, 163 S.E.2d 577, 585 (1968)*; *Wooden v. John Hancock Mut. Life Ins. Co., 205 Va. 750, 755, 139 S.E.2d 801, 805 (1965)*.

### PRACTICE COMMENTARY

This instruction covers claims under insurance policies that cover accidental death, dismemberment or other injury. When a policy provides coverage for loss of life or injury through accidental means, the death or injury is not accidental within the meaning of the policy if the insured voluntarily provoked the act causing his or her death or injury, or where he or she is the aggressor and knows, or should reasonably anticipate, that he or she will be in danger of death or great bodily harm as the natural or probable consequence of his or her act or course of action. *Tucker, 228 Va. at 59–60, 321 S.E.2d at 81.* See Instruction No. 47.810, Suicide: Burden of Proof.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.515
## Intentional Act

**An** [accident; occurrence] **does not include an intentional act by the insured.**

[An insured's intentional act is not an [accident; occurrence] if the resulting harm was reasonably anticipated or the natural and probable consequence of the intentional act.]

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 38.2-2204, 46.2-473.

**Case Authority:** *AES Corp. v. Steadfast Ins. Co., 283 Va. 609, 617–18, 725 S.E.2d 532, 536 (2012)*; *Utica Mut. Ins. Co. v. Travelers Indem. Co., 223 Va. 145, 147, 286 S.E.2d 225, 226 (1982).*

### Practice Commentary

Even though the action that started the chain of events was intentionally performed, it may still be accidental under the terms of an insurance policy if the injury results from an unforeseen cause that is out of the ordinary expectations of a reasonable person. The dispositive issue is not whether the action taken was intended, but whether the resulting harm was reasonably anticipated or the natural or probable consequence of the intentional act. For coverage to be precluded because there was no accident or occurrence, it must be alleged that "the result of an insured's intentional act was more than a possibility; it must be alleged that the insured subjectively intended or anticipated the result of its intentional act or that objectively, the result was a natural or probable consequence of the intentional act." *AES Corp., 283 Va. at 618, 725 S.E.2d at 536.*

Use the bracketed instruction when the issue is whether the harm from an intentional act was reasonably anticipated or the natural and probable consequence of the act.

While the case of *Utica Mutual Insurance Co.* involved an assigned risk policy requiring coverage for an "accident" or "occurrence," the same ruling would apply to the general automobile liability policy issued in Virginia, where the policy is only required to cover liability resulting from negligence. *223 Va. at 147, 286 S.E.2d at 226.*

This view of the Supreme Court is in line with the holdings as to what is "accidental" in accident and sickness policies. See Instruction No. 47.500, Definition of Accidental and the cases cited in the memorandum to that instruction.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 10.6, 13.7, 21.8

Kent Sinclair, Virginia Remedies § 39-2

Michie's Jurisprudence, Insurance §§ 6 through 68

## Instruction No. 47.520
## Permanent Total Disability

**A person is permanently and totally disabled if he is permanently unable to do substantially all the material acts necessary in the occupation he was engaged in at the time he was injured, and if he is permanently unable to do substantially all the material acts necessary in any other occupation for which he is qualified by his education, training, and experience.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Branch v. Commonwealth, 14 Va. App. 836, 840, 419 S.E.2d 422, 425 (1992)*; *Chavez v. Continental Ins. Co., 218 Va. 76, 83, 235 S.E.2d 335, 339 (1977)*; *Carver v. Metropolitan Life Ins. Co., 191 Va. 265, 271, 60 S.E.2d 865, 867–68 (1950)*; *Travelers Ins. Co. v. Brinkley, 166 Va. 147, 150–51, 184 S.E. 225, 226–27 (1936)*; *Atlantic Life Ins. Co. v. Worley, 161 Va. 951, 960, 172 S.E. 168, 172 (1934)*.

### PRACTICE COMMENTARY

As the Court discussed in *Chavez*, this definition of permanent and total disability is an "intermediate" view and has been favored by several appellate courts over the alternative, extreme views. There are two extreme views: one is that a person is totally disabled when he or she is unable to perform the duties of his or her particular occupation; the other is that a person is totally disabled only when he or she is unable to pursue any occupation whatever. *218 Va. at 81, 235 S.E.2d at 338.*

The *Chavez* Court also held that a married woman is permanently and totally disabled despite her ability to perform as "housewife," which otherwise might be considered an occupation itself. Had she been a housewife without employment for pay, however, it appears she would have had to prove that she was unable to function as a housewife. *218 Va. at 83–84, 235 S.E.2d at 339.*

### *ALERTS:*

- The specific provisions of the policy should be considered before tendering an instruction on permanent total disability. This instruction is based on a policy provision that defines "permanent, total disability" as disability which prevents the insured "from engaging in any occupation or employment for which he is fitted by reason of education, training and experience for the remainder of his life." *Chavez, 218 Va. at 78, 235 S.E.2d at 336.*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.530
## Policy Coverage: Burden of Proof

**The insured has the burden of proving by the greater weight of the evidence that he was totally disabled; that the total disability occurred while the policy was in force; and that the total disability resulted from** [an injury; a sickness] **that occurred while the policy was in force.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Pilot Life Ins. Co. v. Karcher, 217 Va. 497, 500–01, 229 S.E.2d 884, 887 (1976)*; *Maryland Casualty Co. v. Cole, 156 Va. 707, 716, 158 S.E. 873, 876 (1931).*

### PRACTICE COMMENTARY

This instruction is based on *Pilot Life Ins. Co.*, where the Court construed the language of the policy in question to require that the occurrence of the injury and the total disability resulting from that injury each take place while the policy was in force. *Pilot Life Ins. Co., 217 Va. at 500–01, 229 S.E.2d at 887.* The instruction must be drawn to fit the particular policy in each case.

See Instruction Nos. 47.130, Recovery Under the Policy: Burden of Proof, and 47.540, Policy Exclusions: Burden of Proof.

☞ ***PRACTICE POINTER:*** See Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence.

### *ALERTS:*

- An insured shall be entitled to recover costs and reasonable attorney fees if the insurer did not act in good faith in denying coverage or refusing to make payment under the policy. Va. Code Ann. § 38.2-209(A). However, the determination whether the insurer acted in bad faith is made by the judge. *REVI, LLC v. Chi. Title Ins. Co., 290 Va. 203, 211, 776 S.E.2d 808, 812 (2015).*

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.540
## Policy Exclusions: Burden of Proof

**The insurance company has the burden of proving by the greater weight of the evidence that a policy exclusion applies.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Travco Ins. Co. v. Ward, 284 Va. 547, 553, 736 S.E.2d 321, 325 (2012)*; *Granite State Ins. Co. v. Bottoms, 243 Va. 228, 233–34, 415 S.E.2d 131, 134 (1992)*; *Smith v. Allstate Ins. Co., 241 Va. 477, 480, 403 S.E.2d 696, 697 (1991)*; *American Reliance Ins. Co. v. Mitchell, 238 Va. 543, 547, 385 S.E.2d 583, 585 (1989)*; *Johnson v. Insurance Co. of N. America, 232 Va. 340, 345, 350 S.E.2d 616, 619 (1986)*; *United States Life Ins. Co. v. Mason, 214 Va. 328, 330, 200 S.E.2d 516, 517 (1973)*; *White v. State Farm Mut. Auto. Ins. Co., 208 Va. 394, 396, 157 S.E.2d 925, 927 (1967)*.

### PRACTICE COMMENTARY

See Instruction Nos. 47.530, Policy Coverage: Burden of Proof and 3.100, Standard of Proof: Definition of Greater Weight of the Evidence.

Exclusions in insurance policies must be read narrowly in favor of coverage. *Allstate Ins. Co. v. Gauthier, 273 Va. 416, 420, 641 S.E.2d 101, 104 (2007)*. Exclusions limiting coverage must be drafted in language that clearly and unambiguously defines their scope. *Travco Ins. Co., 284 Va. at 553, 736 S.E.2d at 325*.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.550
## Pre-Existing Condition

**An insurance company cannot deny coverage for a claim under its policy because the insured had** [a disease; physical impairment; physical defect] **at the time he applied for the policy unless it proves, by the greater weight of the evidence, that the insured knew, or might reasonably be expected to know, of such** [disease; physical impairment; physical defect]**.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. §§ 38.2-309, 38.2-3514.

**CASE AUTHORITY:** *Sharp v. Richmond Life Ins. Co., 212 Va. 229, 232, 183 S.E.2d 132, 134–35 (1971).*

### PRACTICE COMMENTARY

The decision in *Sharp* did not involve a written application, so there was no contention that the predecessor of Va. Code Ann. § 38.2-309 applied. The credit life insurance policy, however, purported to exclude disabilities existing on its effective date. The Court held that the predecessor of Va. Code Ann. § 38.2-3514 was applicable to the purported exclusion. *212 Va. at 232, 183 S.E.2d at 134–35 (1971).*

The *Sharp* Court also affirmed the general rule that insurance coverage may not be extended by estoppel or implied waiver to include risks expressly excluded. *212 Va. at 233, 183 S.E.2d at 135.*

☞ ***PRACTICE POINTER:*** See Instruction Nos. 47.210, Untrue Statements in Application, and 47.220, Answers Recorded by Agent.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.600**
**[RESERVED]**

## Instruction No. 47.610
## [RESERVED]

## Instruction No. 47.700
## Permissive Use Omnibus Clause

**If someone drives a vehicle with the express or implied permission of the insured, then the policy covers the driver so long as he uses the vehicle for the permitted purpose. The driver had express permission if the insured directly stated that he could drive the vehicle. The driver had implied permission if there was a course of conduct between the insured and the driver from which you can fairly infer the owner's consent to the operation.**

**Permission, express or implied, to use a vehicle for a particular purpose may not be unreasonably exceeded.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 38.2-2204.

**Case Authority:** *Government Empls. Ins. Co. v. United Servs. Auto. Ass'n, 281 Va. 647, 657–58, 708 S.E.2d 877, 883–84 (2011)*; *Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 498, 436 S.E.2d 429, 431 (1993)*; *Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 390–91, 105 S.E.2d 869, 873–74 (1958)*; *Hartford Accident & Indem. Co. v. Peach, 193 Va. 260, 264–66, 68 S.E.2d 520, 522–23 (1952)*; *Fidelity & Cas. Co. v. Harlow, 191 Va. 64, 71, 59 S.E.2d 872, 875 (1950)*; *State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 665, 43 S.E.2d 863, 866 (1947)*; *Sordelett v. Mercer, 185 Va. 823, 835, 40 S.E.2d 289, 294 (1946).*

## Practice Commentary

The insured must own the vehicle or have such an interest in it that he or she is entitled to possession and control and is in position to give permission. *Nationwide Mut. Ins. Co. v. Cole, 203 Va. 337, 341, 124 S.E.2d 203, 206 (1962).*

By statute, a custodian may also be authorized to grant permissive use of the vehicle. Va. Code Ann. § 38.2-2204(A). A custodian "with whom the named insured has left a vehicle for general use may permit its use by another, who will be deemed to have the permission of the named insured." *Virginia Farm Bureau Mut. Ins. Co. v. Appalachian Power Co., 228 Va. 72, 77, 321 S.E.2d 84, 87 (1984).* See also *Gordon v. Liberty Mut. Ins. Co., 675 F. Supp. 321, 323 (E.D. Va. 1987).*

Business use of a vehicle is evaluated by the extent of deviation from conduct within the scope of an employee's employment. When the "deviation is slight," the operation is within the scope of the employment as a matter of law; when there is a "very marked and unusual" deviation, the operation is beyond the scope of employment as a matter of law. Between these extremes, the issue is for the jury. *Phoenix Indem. Co. v. Anderson & Powell, 170 Va. 406, 414, 196 S.E. 629, 633 (1938).*

When social usage of a vehicle is permitted, then implied permission is to be interpreted more strongly against the insurer. *Nationwide Mut. Ins. Co. v. Vaughn, 307 F. Supp. 805, 808 (W.D. Va. 1969), aff'd sub nom. Nationwide Mut. Ins. Co. v. Allstate Ins. Co., 427 F.2d 715 (4th Cir. 1970).* General permission is more readily assumed where the use is for a social purpose. *Emick v. Dairyland Ins. Co., 519 F.2d 1317, 1322 (4th Cir. 1975).*

The burden of proof is on the party seeking to bring him or herself within the omnibus coverage clause of the policy. *Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 498, 436 S.E.2d 429, 431 (1993).* Virginia has rejected the expansive interpretation that express permission to use a vehicle for one purpose implies permission for all other purposes. *Id.*

Emergency circumstances may warrant an implied permission for a second permittee to operate a motor vehicle even though the permission granted the first permittee expressly included a direction that no other person was to operate the

vehicle. *State Farm Mut. Auto. Ins. Co. v. Geico Indem. Co., 241 Va. 326, 330–33, 402 S.E.2d 21, 23–24 (1991).*

There must be a causal relationship between the accident and the use of the insured vehicle. *Nationwide Mut. Ins. Co. v. Smelser, 264 Va. 109, 114, 563 S.E.2d 760, 763 (2002).*

☞ ***PRACTICE POINTER:*** Where a policy provides for coverage for occupancy, as well as use, of a vehicle, see *Edwards v. Government Emps. Ins.e Co., 256 Va. 128, 132–33, 500 S.E.2d 819, 821 (1998).*

☞ ***PRACTICE POINTER:*** See also *Newman v. Erie Ins. Exchange, 256 Va. 501, 509, 507 S.E.2d 348, 352 (1998)*, interpreting "use" of a school bus by a child preparing to board, in light of Va. Code Ann. § 38.2-2206(B).



### ***ALERTS:***

- To fall within the omnibus clause, the insurance policy must be a policy issued "upon any motor vehicle, aircraft, or private pleasure watercraft." Va. Code Ann. § 38.2-2204(A). Thus, the Supreme Court has held "that a general liability policy, simply because it can provide coverage for a claim related to a motor vehicle, aircraft or a watercraft accident, does not come within the ambit of the omnibus clause because the policy is not written upon the car, plane or boat." *Government Emp. Ins. Co. v. Moore, 266 Va. 155, 162, 580 S.E.2d 823, 826–27 (2003).*

### ***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.710
## Duty to Settle

**If a liability insurer has an opportunity to settle a claim against its insured for an amount within the policy limits and it refuses in bad faith to settle the claim, it is liable for the whole amount of the judgment against the insured, even if the judgment exceeds the policy limit.** [If the insurer's decision not to settle the claim is made in good faith, the insurer is not liable for the amount of the judgment which exceeds the policy limits.]

**A good faith decision is one that is made honestly and intelligently and is reasonable in light of the insurer's expertise in the field.**

**A bad faith decision is one that is made in furtherance of the insurer's own interests, with intentional disregard of the financial interest of the insured.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Horace Mann Ins. Co. v. Government Emps. Ins. Co., 231 Va. 426, 429, 344 S.E.2d 906, 908 (1986); Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 761–62, 146 S.E.2d 220, 228 (1966).*

### PRACTICE COMMENTARY

To establish bad faith in a breach of contract claim, the insured must prove by clear and convincing evidence that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured. *State Farm Mut. Auto. Ins. Co. v. Floyd, 235 Va. 136, 143–44, 366 S.E.2d 93, 97–98 (1988).*

To establish bad faith under the remedial statute Va. Code Ann. § 8.01-66.1, however, the evidentiary burden is the preponderance of the evidence standard. *Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000).*

☞ ***PRACTICE POINTER:*** Va. Code Ann. § 38.2-2206(K) provides an alternative means of settlement whereby the liability insurer may settle a claim with an injured person and be released from its duty to defend its insured if there remains additional underinsured motorist's liability coverage. The liability insurer's insured must consent in writing to the settlement. See Va. Code Ann. § 8.01-66.1 for the remedy for arbitrary refusal of motor vehicle insurance claim.

### *ALERTS:*

- Use the bracketed language when the amount of the judgment exceeded the policy limits and when the jury must decide whether the refusal to settle the claim was in good or bad faith.

***RESEARCH REFERENCES:***

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

## Instruction No. 47.800
## [RESERVED]

**Instruction No. 47.810**
**Suicide: Burden of Proof**

**When death is caused by violent and external means, you should presume that the death was an accident and not suicide. The burden is on the insurance company to prove that the deceased committed suicide. This must be proved by clear and convincing evidence which excludes any reasonable theory that death resulted from natural or accidental causes or from the act of some other person.**

**However, the insurance company is not required to prove that the insured knew, or was capable of realizing, that his act would cause his death, that he was sane, or that he was capable of having an intention of killing himself.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 38.2-3106.

**CASE AUTHORITY:** *Atkinson v. Life Ins. Co., 217 Va. 208, 210–12, 228 S.E.2d 117, 119–20 (1976)*; *Life & Cas. Ins. Co. v. Daniel, 209 Va. 332, 335, 163 S.E.2d 577, 580 (1968).*

### PRACTICE COMMENTARY

This instruction applies to double indemnity provisions and to accidental death provisions. See Instruction Nos. 47.500, Definition of Accidental; 47.510, Accident: Insured the Aggressor.

Generally, a party asserting a claim for accidental death or injury has the burden of proving that the insured's death was caused by violent, external and accidental means within the terms of the policy. *Daniel, 209 Va. at 335, 163 S.E.2d at 580.* When death by external and violent means is proven, a presumption arises that the death was accidental, and evidence to overcome this "presumption must be clear and satisfactory and to the exclusion of any reasonable hypothesis consistent with death from natural or accidental causes." *Id. at 341, 163 S.E.2d at 584.*

If the policy limits liability for suicide within two years of issuance, Va. Code Ann. § 38.2-3106 provides that the insurance company must return the premiums paid on such policy.

A beneficiary who murders an insured may not recover. Va. Code Ann. § 64.2-2500, et. seq. (Virginia Slayer Statute).

☞ ***PRACTICE POINTER:*** Clear and convincing evidence is defined in Instruction No. 3.110.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA §§ 10.6, 13.7, 21.8

Kent Sinclair, VIRGINIA REMEDIES § 39-2

MICHIE'S JURISPRUDENCE, Insurance §§ 6 through 68

**Instruction No. 47.820**
**Accidental Death: Pre-Existing Condition**

**When the death of the insured was caused not only by the accident, but also by a condition which existed before the policy became effective, and which substantially contributed to cause his death, then there can be no recovery.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Macaulay v. Home Beneficial Life Ins. Co., 235 Va. 649, 653, 369 S.E.2d 420, 422 (1988)*; *Tanner v. Life Ins. Co., 217 Va. 218, 220, 227 S.E.2d 693, 694–95 (1976)*; *Crowder v. Gen. Acc., Fire & Life Assur. Corp., Ltd., 180 Va. 117, 121, 21 S.E.2d 772, 774 (1942).*

### Practice Commentary

"If death results from an accident that merely exacerbated a pre-existing condition, that pre-existing condition is at least a contributing cause of the death or, put another way, the death was not independent of all other causes." *Macaulay, 235 Va. at 653, 369 S.E.2d at 422.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, Personal Injury Law in Virginia §§ 10.6, 13.7, 21.8

Kent Sinclair, Virginia Remedies § 39-2

Michie's Jurisprudence, Insurance §§ 6 through 68

# Chapter 48

# WILL CONTESTS

**Scope Note**


**Instruction No. 48.000** **Issues and Burden of Proof**

**Instruction No. 48.010** **Definition of Will**

**Instruction No. 48.020** **Proper Execution**

**Instruction No. 48.030** **Testamentary Intent**

**Instruction No. 48.040** **Testamentary Capacity**

**Instruction No. 48.050** **Revocation**

**Instruction No. 48.055** **Revocation Presumption**

**Instruction No. 48.060** **Revival**

**Instruction No. 48.070** **Undue Influence**

**Instruction No. 48.090** **Finding Instruction**

# SCOPE NOTE

These instructions cover the issues that arise in will-contest proceedings. Will contests are statutory proceedings. There are several ways to contest a will. The first is to appeal from the order of a clerk admitting a will to probate. Va. Code Ann. §§ 64.2-444, 64.2-445. (Va. Code Ann. § 64.2-446 also provides a procedure whereby any person intending to offer a will for probate may obtain process from the clerk directed to a proper officer to summon any person interested in the probate to show cause why the will should not be admitted to probate. This is commonly known as "inter partes probate proceeding.") The second is to file a complaint to impeach or establish a will. Va. Code Ann. § 64.2-448. The most significant difference between them is that proceedings under Va. Code Ann. § 64.2-445 must be brought within six months after entry of the clerk's order while proceedings under Va. Code Ann. § 64.2-448 must be brought within one year after entry of the clerk's order, unless that order is on appeal, and then within one year after entry of the court's order deciding that appeal. If, however, a document or a writing added upon a document was not executed in compliance with Va. Code Ann. § 64.2-403 and a person seeks to establish that it was intended by the decedent to constitute a will or other document specified in Va. Code Ann. § 64.2-404, the remedy granted by Va. Code Ann. § 64.2-404 "is available only in proceedings brought in a circuit court . . . within one year from the decedent's date of death and in which all interested persons are made parties." Under either of these proceedings any interested party may demand a jury. Va. Code Ann. §§ 64.2-446, 64.2-448.

The only question in a will contest is *devisavit vel non* which translates roughly, "is it a will or not?" The will-contest jury must decide if a writing is a will or which of several writings is the will. The issues which arise most frequently in will contests are: was the writing executed in conformity with the statutory requirements; did the decedent have testamentary intent when the writing was executed; did the decedent have testamentary capacity when the writing was executed; was the writing revoked; was a revoked writing revived; did anyone exert undue influence over the decedent; or was a proffered writing the product of fraud? This chapter offers instructions on all those issues except the last, fraud. That issue is covered in Chapter 39, Fraud.

The first instruction in this chapter, Instruction No. 48.000, Issues and Burden of Proof, is a general issues-and-burden-of-proof instruction for will-contest cases. It is adapted from Instruction No. 3.000, Issues and Allocation of Burdens of Proof.

Instruction No. 48.010 defines "will." The definition is broad enough to cover all wills including holographs and soldier's personal-estate wills. The use of the word "writing" in the instruction defining a will is carried over into the other instructions. The Committee selected that word because it conveyed the most important aspect of a will, that it be in writing, without conveying the impression that the writing be an elaborate or formal one, as "document" might suggest, and without being laborious, as "the purported will" would be.

Instruction No. 48.020, Proper Execution, tracks Va. Code Ann. § 64.2-403 in listing the elements of a valid execution. Va. Code Ann. § 64.2-404 provides, however, that a document or a writing added upon a document, which was not executed in compliance with Va. Code Ann. § 64.2-403, shall be treated as properly executed under the specific

circumstances listed in the statute. This instruction is designed to cover nonholographic wills since they are most common.

Instruction Nos. 48.030 and 48.040, respectively, define testamentary intent and testamentary capacity. The former is less frequently an issue, but there are several cases that suggest that an instruction may be helpful.

Revocation is covered in Instruction Nos. 48.050, Revocation, and 48.055, Revocation Presumption. The statutory requirements as set forth in Va. Code Ann. § 64.2-410 are included in Instruction No. 48.050. Instruction No. 48.055 contains the presumption of revocation that has developed in the case law. Partial revocation by divorce, Va. Code Ann. § 64.2-412, is discussed in the Commentary to Instruction No. 48.050. There is no separate instruction on revocatory intent, but Instruction No. 48.030, Testamentary Intent, could be adapted to that purpose.

The statutory requirements for revival are found in Va. Code Ann. § 64.2-411 and incorporated in Instruction No. 48.060. As with revocation, there is no separate instruction on the requisite intent; instead, Instruction No. 48.030, Testamentary Intent, can be adapted.

The last substantive instruction is on undue influence. Instruction No. 48.070 contains the elements of undue influence and is designed to be adapted to cover the facts of the case at trial.

Instruction No. 48.090, Finding Instruction, is adapted from the general burden-of-proof-and-finding instructions in Chapter 3, Issues, Burden of Proof and Finding Instructions. In will-contest cases, Instruction No. 3.100, Standard of Proof: Definition of Greater Weight of the Evidence, should be given and Instruction No. 3.110, Standard of Proof: Definition of Clear and Convincing Evidence, may also need to be given.

The words "proponent" and "contestant" are used throughout this chapter. Other descriptive words or the names of the parties may be substituted.

Although not involving a will-contest, for a discussion of the burden of proof for a relative of a testator claiming under an oral agreement, see *Virginia Home for Boys & Girls v. Phillips, 279 Va. 279, 286, 688 S.E.2d 284, 287–88 (2010).*

**Instruction No. 48.000**
**Issues and Burden of Proof**

**Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.**

**The only question in this case is whether** [this writing is; these writings are] **the last will of** (name of decedent)**. In deciding this question, you will have to consider these issues:**

**(1) Was the writing properly executed?**

**(2) Did** (name of decedent) **have testamentary intent when he signed it?**

**(3) Did** (name of decedent) **have testamentary capacity when he signed it?**

**On these issues, the proponents of the will have the burden of proof by the greater weight of the evidence.**

**(4) Was the writing ever revoked?**

**On this issue, the contestants have the burden of proof by the greater weight of the evidence.**

**(5) Did anyone exert undue influence on** (name of decedent)**?**

**(6) Did anyone fraudulently bring about the execution of the writing?**

**On these issues, the contestants have the burden of proof by clear and convincing evidence.**

**Your decisions on these issues must be governed by the following instructions.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Weedon v. Weedon, 283 Va. 241, 252, 255, 720 S.E.2d 552, 558, 559 (2012).*

### PRACTICE COMMENTARY

This instruction can be tailored to cover both the situation where the question is whether one writing is the last will and the situation where the question is which, if any, of several writings is the last will.

There is an additional issue, whether a revoked writing was revived, that may occur in some will contest cases. The proponent must prove revival.

For a discussion of the burden of proof for a relative of a testator claiming under an oral agreement, see *Virginia Home for Boys & Girls v. Phillips, 279 Va. 279, 286, 688 S.E.2d 284, 287–88 (2010).*

### *ALERTS:*

- This is an omnibus instruction designed to be adapted to specific cases by striking out those issues that are not disputed and renumbering those that remain.

- Under Va. Code Ann. § 64.2-404(A), although a document, or a writing added upon a document, was not executed in compliance with § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will. Va. Code Ann. § 64.2-404(A).

Va. Code Ann. § 64.2-404(B) provides further as follows:

> The remedy granted by this code section (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.

- A "court may reform the terms of a will or codicil, even if unambiguous, to conform the terms to the decedent's intention if it is proved by clear and convincing evidence that both the decedent's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement." Va. Code Ann. § 64.2-404.1(A). Further, if proved by clear and convincing evidence, "the court may modify the terms of a decedent's will to achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention." Va. Code Ann. § 64.2-404.1(B). A proceeding to reform a will to correct mistakes

or achieve a decedent's tax objectives must be filed within one year from the decedent's date of death and all interested persons must be made parties. Va. Code Ann. § 64.2-404.1(D).

- If the drafter of the will holds a position of trust and confidence and is a major beneficiary, the burden of proving due execution includes explaining suspicious circumstances surrounding execution of the will. *Redford v. Booker, 166 Va. 561, 584–85, 185 S.E. 879, 889–90 (1936).*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.010**
**Definition of Will**

**A will is any writing that is legally executed in which a person states how his property is to be disposed of after he dies.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 64.2-100, 64.2-403, 64.2-404, 64.2-407, 64.2-408.

**Case Authority:** *Schilling v. Schilling, 280 Va. 146, 149–50, 695 S.E.2d 181, 183 (2010)*; *Berry v. Trible, 271 Va. 289, 298, 626 S.E.2d 440, 444 (2006)*; *Kidd v. Gunter, 262 Va. 442, 446, 551 S.E.2d 646, 648 (2001)*; *Bailey v. Kerns, 246 Va. 158, 162, 431 S.E.2d 312, 314–15 (1993)*; *Moyers v. Gregory, 175 Va. 230, 233, 7 S.E.2d 881, 882 (1940)*; *Smith v. Smith, 112 Va. 205, 208, 70 S.E. 491, 492 (1911)*.

### Practice Commentary

As far as the piece of paper itself is concerned, a will is anything that is (1) written, (2) legally executed, and (3) disposes of the decedent's property that takes effect after he dies. The word "any" is used to help convey the fact that formalities such as blue binders, red ribbons, and typed words on purple margined paper are not necessary. If the absence of formalities is likely to be a question in the jury's mind, an explanatory sentence can be added to this instruction.

The statutory requirements for the valid execution of wills, including holographic wills, are set out in Va. Code Ann. § 64.2-403; however, an exception to these requirements is contained in Va. Code Ann. § 64.2-404. Whether a writing offered for probate is a valid will is determined by applying the law in effect on the date of the death of the maker and not at the time of execution of the writing. *Schilling, 280 Va. at 150, 695 S.E.2d at 183*. References in the writing to a section of the Code of Virginia that, at the time the reference was made in the writing, had been repealed and transferred in the same or modified form to a new section, article or chapter in Title 64.2 of the code, shall be construed to refer to the latter in the absence of any intent to the contrary. Va. Code Ann. § 64.2-108.1.

There are special provisions for the will of the personal estate of soldiers, Va. Code Ann. §§ 64.2-407, 64.2-408. For a case discussing use of a handwriting expert to justify admission of a holographic will to probate, see *Bowers v. Huddleston, 241 Va. 83, 86–87, 399 S.E.2d 811, 812–13 (1991)*.

If other technical words, such as "codicil," have been used during the trial or will be used in the other instructions, they should be defined here also. Further, the other instructions should be altered to help the jury understand which other instructions apply, for example, to codicils, as well as to wills.

The proponent of a writing has the burden of proving that it is a will, and that the decedent signed it with testamentary intent and testamentary capacity. Having put on sufficient evidence of each of those elements, the proponent has made out a prima facie case and can either rest or offer evidence to negate other grounds for refusing the will. *Savage v. Nute, 180 Va. 394, 400, 23 S.E.2d 133, 136 (1942)*.

☞ ***Practice Pointer:*** Regarding multiple-party "payable on death" accounts, see Va. Code Ann. §§ 6.2-608–6.2-610. See also *Virginia Nat'l Bank v. Harris, 220 Va. 336, 340, 342, 257 S.E.2d 867, 869–871 (1979)* ("[w]e think the rights of the

P.O.D. beneficiary must be determined by reference to . . . contract principles rather than by laws relating to wills.").

***ALERTS:***

- The burden of proof in a "lost will" case is on the proponent by clear and convincing evidence. *Edmonds. v. Edmonds, 290 Va. 10, 19, 23, 772 S.E.2d 898, 902, 903–05 (2015).* See Instruction No. 48.055, Revocation Presumption.

- Va. Code Ann. § 64.2-404 provides the following exception for a document intended by the decedent to constitute a will or other specified writing:

> Although a document, or a writing added upon a document, was not executed in compliance with [Va. Code Ann.] § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with [Va. Code Ann.] § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.
>
> The remedy granted by this section (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.

- A "court may reform the terms of a will or codicil, even if unambiguous, to conform the terms to the decedent's intention if it is proved by clear and convincing evidence that both the decedent's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement." Va. Code Ann. § 64.2-404.1(A). Further, if proved by clear and convincing evidence "the court may modify the terms of a decedent's will to achieve the decedent's tax objectives in a manner that is not contrary to the decedent's probable intention." Va. Code Ann. § 64.2-404.1(B). A proceeding to reform a will to correct mistakes or achieve a decedent's tax objectives must be filed within one year from the decedent's date of death and all interested persons must be made parties. Va. Code Ann. § 64.2-404.1(D).

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.020**
**Proper Execution**

**No writing can be the last will of** (name of decedent) **unless:**

**(1)** [he signed it; someone signed it for him at his direction and in his presence] **in such a way that it is clear that the writing was intended as his signature; and**

**(2)** [he signed it in the presence of two witnesses who were both there at the time that he signed; he acknowledged his will in the presence of two witnesses who were both there at the same time;] **and**

**(3)** **the two witnesses signed the will in** (name of decedent)**'s presence.**

## Sources & Authority

**Governing Statutes:** *Va. Code Ann. § 64.2-403.*

**Case Authority:** *Irving v. Divito, 294 Va. 465, 470–73, 807 S.E.2d 741, 744–45 (2017); Hampton Rds. Seventh-Day Adventist Church v. Stevens, 275 Va. 205, 210–11, 657 S.E.2d 80, 83 (2008); Draper v. Pauley, 253 Va. 78, 80, 480 S.E.2d 495, 496 (1997); Robinson v. Ward, 239 Va. 36, 41–42, 387 S.E.2d 735, 738 (1990); Payne v. Rice, 210 Va. 514, 516–17, 171 S.E.2d 826, 828 (1970); Quesenberry v. Funk, 203 Va. 619, 625, 125 S.E.2d 869, 874 (1962); Ferguson v. Ferguson, 187 Va. 581, 590–94, 47 S.E.2d 346, 351–53 (1948); Barnes v. Bess, 171 Va. 1, 10, 197 S.E. 403, 406 (1938).*

## Practice Commentary

The witnesses need not be able to testify that they actually witnessed the signature being applied to the paper. It is sufficient if they were generally aware that the decedent was signing. The statutory word "presence" is used in this instruction. See *Parramore v. Taylor, 52 Va. (11 Gratt.) 220, 240–59 (1854); Rosser v. Franklin, (6 Gratt.) 1, 25–26 (1849).*

"The failure of the witnesses to acquaint themselves with the contents of the document which they were witnessing does not make it void." *Canody v. Hamblin, 295 Va. 597, 603–04, 816 S.E.2d 286, 289–90 (2018).*

The statute requires the witnesses to be competent, and this means competent as of the time they witnessed the will's signing. *Bruce v. Shuler, 108 Va. 670, 676, 62 S.E. 973, 976 (1908).* This element was not included in the instruction because it arises so infrequently. The witnesses do not need to know what the will says to be competent. *Redford v. Booker, 166 Va. 561, 571–72, 185 S.E. 879, 884 (1936).*

The order in which the decedent and the witnesses sign is not important if it is in one continuous transaction. *Rosser, 47 Va. (6 Gratt.) at 26.*

Like the decedent, witnesses can "subscribe" the will within the meaning of the statute by writing their signatures, making a mark, or acknowledging someone else's writing of their signature as their signature. *Sturdivant v. Birchett, 51 Va. (10 Gratt.) 67, 104–05 (1853).*

The decedent does not have to ask people to witness his will; it is enough if he does not object to their being witnesses. *Savage v. Bowen, 103 Va. 540, 549, 49 S.E. 668, 671 (1905).*

To meet the requirement that a will be signed by the testator, it must appear from the face of the document that the person who wrote his or her name intended such to be his or her signature. *Slate v. Titmus, 238 Va. 557, 560, 385 S.E.2d 590, 591 (1989).*

What constitutes a signature for purposes of Va. Code Ann. § 64.2-403(A) depends largely on the circumstances of each case. *Irving, 294 Va. at 473, 807 S.E.2d at 745; Pilcher v. Pilcher, 117 Va. 356, 364–66, 84 S.E. 667, 670–71 (1915).*

The signature requirement in Va. Code Ann. § 64.2-403(A) requires the

concurrence of the intention to make a will and the intention to sign the instrument as and for a will. *Irving, 294 Va. at 471–72, 807 S.E.2d at 744.*

While placing one's signature at the end of the document may be the best and clearest way of signing a will, the signature does not have to appear at the foot of the writing. *Titmum, 238 at 559, 385 S.E.2d at 591.*

Note that Va. Code Ann. § 64.2-403 requires the decedent to sign in the presence of at least two competent witnesses who are present at the same time. Further, the statute requires both of the witnesses to sign in the decedent's presence, but does not require the witnesses to sign in each other's presence. See *Baldwin v. Baldwin, 81 Va. (6 Hans.) 405, 411–12 (1886).*

### *ALERTS:*

- Va. Code Ann. § 64.2-404 provides an exception to the requirements of Va. Code Ann. § 64.2-403 for a document intended by the decedent to constitute a will or other specified writing:

> Although a document, or a writing added upon a document, was not executed in compliance with [Va. Code Ann.] § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with [Va. Code Ann.] § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.
>
> The remedy granted by this section (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.

- This instruction does not apply to holographic wills. To be valid, a holographic will must be made wholly in the testator's handwriting, and the testator must either sign the will or have someone else sign the will at his direction and in his presence, and it must be clear from the face of the document that the mark or name so written was intended as a signature. A valid holographic will need not be signed in the presence of two witnesses who are present at the same time, or subscribed by them in the presence of the testator, but at least two disinterested witnesses must identify the handwriting as that of the testator. Va. Code Ann. § 64.2-403(B); *Berry, 271 Va. at 297, 626 S.E.2d at 444*; *Kidd v. Gunter, 262 Va. 442, 445, 551 S.E.2d 646, 648 (2001)*; *Slate, 238 Va. at 560, 385 S.E.2d at 591.*

- The presence of typewritten material on the paper used to draft a holographic will does not affect the holographic instrument's validity as a will as long as the typewritten material is not part of the instrument's testamentary provisions and is

not referenced directly or indirectly by those provisions. *Moon v. Norvell, 184 Va. 842, 850–51, 36 S.E.2d 632, 635 (1946).* In cases where a handwritten will is made on paper containing typewritten material, a holographic will may only be established upon consideration of *all* handwritten entries made by the testator on that document, not only portions thereof, and "a purported holographic will is invalid if the handwritten entries are so interwoven with or joined to the typewritten material on the document, or continue from the typewritten material in physical form, by reference, or in sequence of thought." *Berry, 271 Va. at 301, 626 S.E.2d at 446.*

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.030**
**Testamentary Intent**

**No writing can be the last will of** (name of decedent) **unless:**

**(1) he intended it to be an actual disposition of his property; and**

**(2) he intended the disposition to take effect after he died.**

(Name of decedent)**'s intent on either or both of these issues can be either express or implied, or both. An intent is express when it is actually stated; it is implied when it can be gathered from the circumstances.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Hampton Rds. Seventh-Day Adventist Church v. Stevens, 275 Va. 205, 212, 657 S.E.2d 80, 83 (2008)*; *Robinson v. Ward, 239 Va. 36, 42, 387 S.E.2d 735, 739 (1990)*; *First Church of Christ, Scientist v. Hutchings, 209 Va. 158, 159–60, 163 S.E.2d 178, 179 (1968)*; *Henderson v. Henderson, 183 Va. 663, 667, 33 S.E.2d 181, 182–83 (1945)*; *Thompkins v. Randall, 153 Va. 530, 536–37, 150 S.E. 249, 250–51 (1929)*; *Rice v. Freeland, 131 Va. 298, 304, 109 S.E. 186, 188 (1921)*; *Clark v. Hugo, 130 Va. 99, 106–07, 107 S.E. 730, 733 (1921)*; *McBride v. McBride, 67 Va. (26 Gratt.) 476, 480–81 (1875).*

### PRACTICE COMMENTARY

Testamentary intent is a seldom disputed issue, especially with professionally prepared wills. However, the issue of testamentary intent might arise where the testament was a letter or some other informal writing.

Testamentary intent is initially determined by looking at the document itself, and the question whether the face of the document contains evidence of testamentary intent is a matter of law for the trial court. "If a court determines there is no evidence of testamentary intent within the four corners of the instrument, that instrument is not a valid will." However, if a court determines that there is evidence of testamentary intent within the four corners of the instrument then "extrinsic evidence may be admitted to determine whether the instrument is testamentary in nature." *Irving v. Divito, 294 Va. 465, 474, 807 S.E.2d 741, 745–46 (2017).* Further, when the genuineness of a will is challenged, the court may consider evidence of the decedent's state of mind and testamentary plan or intent as being consistent or inconsistent with a will. *Canody v. Hamblin, 295 Va. 597, 602–03, 816 S.E.2d 286, 288–89 (2018)* However, such evidence, standing alone, is not admissible as direct evidence to prove or disprove the genuineness of a will. *Id.*

To have testamentary intent, the decedent must have read or have had read to him, or have otherwise known, the contents of the writing. *Montague v. Allan, 78 Va. 592, 599 (1884)*; *Tucker v. Calvert, 10 Va. (6 Call.) 90, 98–99 (1806).*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16.

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

## Instruction No. 48.040
## Testamentary Capacity

**No writing can be the last will of** (name of decedent) **unless, at the time he signed it, he had enough mind and intelligence:**

**(1) to understand what he was doing in making his will; and**

**(2) to know the nature and extent of the property he was attempting to dispose of; and**

**(3) to be aware of his relatives and others to whom he might naturally want to give his property; and**

**(4) to determine to whom he was giving his property and in what manner.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. § 64.2-401.

**Case Authority:** *Weedon v. Weedon, 283 Va. 241, 252, 720 S.E.2d 552, 558 (2012)*; *Fields v. Fields, 255 Va. 546, 550, 499 S.E.2d 826, 828 (1998)*; *Gibbs v. Gibbs, 239 Va. 197, 199, 387 S.E.2d 499, 500 (1990)*; *Pace v. Richmond, 231 Va. 216, 219, 343 S.E.2d 59, 61 (1986)*; *Thomason v. Carlton, 221 Va. 845, 852–53, 276 S.E.2d 171, 175 (1981)*; *Eason v. Eason, 203 Va. 246, 253, 123 S.E.2d 361, 366 (1962)*; *Tate v. Chumbley, 190 Va. 480, 493, 57 S.E.2d 151, 157 (1950)*; *Tabb v. Willis, 155 Va. 836, 859, 156 S.E. 556, 564 (1931)*.

## Practice Commentary

There is a rebuttable presumption that a person had testamentary capacity. *Gibbs, 239 Va. at 200, 387 S.E.2d at 501*; *Redford v. Booker, 166 Va. 561, 569–70, 185 S.E. 879, 883 (1936)*.

The proponent of a will is entitled to a presumption that testamentary capacity existed by proving compliance with all statutory requirements for the valid execution of the will. Once the proponent meets the burden, then the contestant bears the burden of going forward with sufficient evidence to overcome this presumption. However, the burden of persuasion remains with the proponent. *Kiddell v. Labowitz, 284 Va. 611, 623, 733 S.E.2d 622, 628 (2012)*; *Gibbs, 239 Va. at 200, 387 S.E.2d at 501*.

In *Western State Hosp. v. Wininger, 196 Va. 300, 311, 83 S.E.2d 446, 452–53 (1954)*, an adjudication of insanity created a "prima facie presumption" of the testator's testamentary incapacity to make any will subsequent thereto. To overcome this presumption, the proponent of the will must prove by clear and convincing evidence that the capacity to make a will existed at the time of execution. *Id. at 313, 835 S.E.2d at 453*. However, "[t]he mere fact that one is under a conservatorship is not an adjudication of insanity and does not create a presumption of incapacity." *Parish v. Parish, 281 Va. 191, 198, 704 S.E.2d 99, 103 (2011)*.

Certain disabilities are more likely to be issues in a will contest. None precludes testamentary capacity, although some might bear on it. The facts in a particular case will dictate whether an instruction is needed to assure the jury that, for example, blindness does not keep someone from having testamentary capacity. The following are citations to cases and the disabilities discussed in each: *Eason, 203 Va. at 253, 123 S.E.2d at 366* (insane delusions); *Western State Hosp., 196 Va. at 311, 855 S.E.2d at 452–53* (insanity); *Tate, 190 Va. at 493, 57 S.E.2d at 157* (insanity); *Gilmer v. Brown, 186 Va. 630, 637, 44 S.E.2d 16, 19 (1947)* (old age and disease); *Jenkins v. Trice, 152 Va. 411, 421, 147 S.E. 251, 253 (1929)* (chronic alcoholism); *Wood v. Wood, 109 Va. 470, 472, 63 S.E. 994, 994–95 (1909)* (illiteracy); *Boyd v. Cook, 30 Va. (3 Leigh) 32, 51 (1831)* (blindness); *Temple v. Temple, 11 Va. (1 Hen. & M.) 476, 477 (1807)* (use of opium and alcohol).

The wisdom, or lack of it, demonstrated in a will, the persons included and

excluded, the property included and excluded, the decedent's actions around the time he made the will, his age and physical condition, and many other factors are all pieces of evidence from which the jury will decide whether a person had testamentary capacity. Whether it is wise generally or in a particular case to emphasize in an instruction one piece of evidence is beyond the scope of the Committee's work. For cases bearing on these types of circumstances, see: *Eason, 203 Va. at 253, 123 S.E.2d at 366* (omission of person); *Western State Hosp., 196 Va. at 312, 85 S.E.2d at 452–53* (decedent's preceding and subsequent mental condition); *Tabb, 155 Va. at 859–60, 156 S.E. at 564* (illness); *Jenkins, 152 Va. at 442, 147 S.E.2d at 261* (physical condition and bequest of property decedent did not own); *Samuel v. Hunter, 122 Va. 636, 640–41, 95 S.E. 399, 400 (1918)* (declarations of decedent); *Wohlford v. Wohlford, 121 Va. 699, 706–07, 93 S.E. 629, 631 (1917)* (unwise will); *Wooddy v. Taylor, 114 Va. 737, 741, 77 S.E. 498, 500 (1913)* (directions concerning business); *Wallen v. Wallen, 107 Va. 131, 151, 57 S.E. 596, 599 (1907)* (unwise will); *Chappell v. Trent, 90 Va. 849, 861, 19 S.E. 314, 318 (1893)* (memory); *Tucker v. Sandidge, 85 Va. 546, 572–73, 8 S.E. 650, 663 (1888)* (old age and disease); *Marks v. Bryant, 14 Va. (4 Hen. & M.) 91, 100 (1809)* (bequest of property decedent did not own).

### ***ALERTS:***

- In *Kiddell v. Labowitz, 284 Va. 611, 628, 733 S.E.2d 622, 631 (2012)*, the Supreme Court of Virginia held that "the determination of whether the presumption [of testamentary capacity] has been rebutted is to be determined by the jury, unless the opponent has rebutted the presumption as a matter of law." The Court also held that "[w]hen the proponent of a will enjoys the presumption of testamentary capacity, the jury must be instructed as to this presumption." *Id.* Finally, the Court held that the circuit court did not err in granting two jury instructions as to the existence of the presumption, the requirement that the opponents introduce evidence sufficient to rebut the presumption, and as to the burdens and standards of proof. *Id.* This Instruction and Instruction No. 48.090 should be adapted to include the issues and findings as may be applicable.

In *Parson v. Miller, 296 Va. 509, 525–27, 822 S.E.2d 169, 178–80 (2018)*, in discussing the presumption of undue influence, the Supreme Court of Virginia held that once rebutted, the presumption "disappeared," and the jury should not be instructed on the presumption.

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.050**
**Revocation**

**An earlier** [will; codicil] **can be revoked by:**

**(1) a properly executed later will, or other writing in the manner in which a will is required to be executed, of** (name of decedent) **that expressly revokes an earlier** [will; codicil]**; or**

**(2)** [(name of decedent); (name of person acting in the decedent's presence and by his direction)] [cutting; tearing; burning; obliterating; cancelling; destroying; drawing lines through; intentionally writing over the actual words of] **the** [will; signature on the will; codicil]**.**

**Nothing is effective as a revocation unless** (name of decedent) **intended it as a revocation.**

## Sources & Authority

**Governing Statutes:** Va. Code Ann. §§ 64.2-410, 64.2-411, 64.2-412, 64.2-413.

**Case Authority:** *Edmonds. v. Edmonds, 290 Va. 10, 19, 23, 772 S.E.2d 898, 903, 905 (2015)*; *Wolfe v. Wolfe, 248 Va. 359, 360–61, 448 S.E.2d 408, 409 (1994)*; *Goriczynski v. Poston, 248 Va. 271, 275, 448 S.E.2d 423, 425–26 (1994)*; *Jessup v. Jessup, 221 Va. 61, 71–72, 267 S.E.2d 115, 121 (1980)*; *McKenzie v. Francis, 214 Va. 104, 105–06, 197 S.E.2d 221, 223–24 (1973)*; *Poindexter v. Jones, 200 Va. 372, 379–84, 106 S.E.2d 144, 148–52 (1958)*; *Sutherland v. Sutherland, 192 Va. 764, 767, 66 S.E.2d 537, 539 (1951)*; *Franklin v. McLean, 192 Va. 684, 689, 66 S.E.2d 504, 506 (1951)*; *Thompson v. Royall, 163 Va. 492, 497–98, 175 S.E. 748, 750 (1934)*.

## Practice Commentary

By statute, neither getting married nor having a child revokes a will. However, divorce or annulment does revoke a will insofar as the will benefitted the former spouse. If the provisions of the will are revoked solely by divorce or annulment, remarriage of the parties to each other revives those provisions. Va. Code Ann. § 64.2-412.

Revocation of a will is presumed if the will was in the custody of the testator and is in such state of mutilation, obliteration or cancellation to constitute a sufficient act of revocation under the statute. *Jessup, 221 Va. at 71–72, 267 S.E.2d at 121*. The proponent of the will has the burden of proof to rebut the presumption. *Franklin, 192 Va. at 689, 66 S.E.2d at 506*. The standard of proof required to rebut revocation by mutilation, obliteration, etc. is to produce "evidence to contrary." *McKenzie, 214 Va. at 106, 197 S.E.2d at 223*. However, when a will cannot be found, the proponent must produce clear and convincing evidence to overcome the presumption of revocation. *Edmonds, 290 Va. at 19, 23, 772 S.E.2d at 903, 905*; *Sutherland, 192 Va. at 767, 66 S.E.2d at 539*. Instruction No. 48.055 covers revocation presumptions.

A will which has been expressly revoked by a subsequent will does not regain vitality upon revocation of the subsequent will. *Poindexter, 200 Va. at 381, 106 S.E.2d at 150*. However, if the later will does not expressly revoke the entirety of the earlier will, or if there is no express revocation but provisions of the later will are inconsistent with the earlier will, then the revoked or inconsistent provisions of the earlier will are superseded only if the later will becomes effective upon the death of the testator. Va. Code Ann. § 64.2-410(C). No instruction was drawn for such a situation; the existing instructions can be altered to put the issue correctly before the jury.

Virginia recognizes the doctrine of dependent relative revocation. "According to the doctrine, if a testator performs any act to vitiate a will with the present intention of making a new will immediately, and the new [will] is not made, or if made fails for any reason, then the old will, having been conditionally revoked, still stands."

*Goriczynski, 248 Va. at 274–75, 448 S.E.2d at 425.* But see Va. Code Ann. § 64.2-411 ("Revival of wills after revocation").

Va. Code Ann. § 64.2-404 provides that a document or writing that was not executed in compliance with Va. Code Ann. § 64.2-403 shall be treated as properly executed under specific circumstances if the decedent intended the document or writing to constitute (i) a will, (ii) a partial or complete revocation of a will, or (iii) a partial or complete revival of a formerly revoked will or of a formally revoked portion of a will. In cases where revocatory intent is an issue, Instruction No. 48.030 may be adapted to that purpose.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.055**
**Revocation Presumption**

**When it has been proved by the greater weight of the evidence that there was an executed will in the possession of** (name of decedent) **and that it cannot be found after his death, then the law presumes that it was destroyed by** (name of decedent) **with the intention of revoking it.**

**To overcome this presumption the burden is on** (name of proponent) **to prove by clear and convincing evidence that** (name of decedent) **did not revoke the will.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Edmonds. v. Edmonds, 290 Va. 10, 19, 772 S.E.2d 898, 903 (2015)*; *Johnson v. Cauley, 262 Va. 40, 43, 546 S.E.2d 681, 683 (2001)*; *Brown v. Hardin, 225 Va. 624, 626, 304 S.E.2d 291, 292 (1983)*; *Harris v. Harris, 216 Va. 716, 719, 222 S.E.2d 543, 545 (1976)*; *McKenzie v. Francis, 214 Va. 104, 105–06, 197 S.E.2d 221, 223 (1973).*

### PRACTICE COMMENTARY

Two different presumptions may arise when an original will cannot be found after the testator's death. First, a rebuttable presumption of revocation arises when an executed will that was in the custody of the decedent cannot be found after his death. The proponent of the missing will must prove by clear and convincing evidence that the decedent did not revoke the will. *Johnson, 262 Va. at 43, 546 S.E.2d at 683; Harris, 216 Va. at 719, 222 S.E.2d at 545.*

Second, a rebuttable presumption of loss arises when a will that was not in the possession of the decedent after its execution, and that was not accessible to him, cannot be found. In such cases, the contestant of the missing will must prove by clear and convincing evidence that the will was revoked. *Johnson, 262 Va. at 43, 546 S.E.2d at 683; Harris, 216 Va. at 719, 222 S.E.2d at 545.* This instruction must be modified if there is a presumption of a lost will.

The presumption of revocation can be overcome by the proponent of the will upon presentation of clear and convincing evidence, leading to the conclusion that the will was not revoked by the testator. *Edmonds, 290 Va. at 19, 772 S.E.2d at 903.* Clear and convincing evidence has been defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal. *Id. at 24, 772 S.E.2d at 905.* See also Instruction No. 3.110 (defining clear and convincing evidence and discussing pertinent cases). It may very well be impossible for the proponent of a missing will to explain what happened to the will, and therefore the statements of the testator regarding his testamentary intent may be the best evidence to rebut the presumption of revocation. *Edmonds, 290 Va. at 20, 772 S.E.2d at 903.* A proponent of a missing will is not required to specifically prove what became of the missing will. *Id. at 23, 772 S.E.2d at 905.*

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6
MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.060**
**Revival**

**Once a will has been revoked, it can be revived only by the proper** [reexecution of the will; execution of a codicil] **with the intent to revive it.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** Va. Code Ann. § 64.2-411.

**CASE AUTHORITY:** *Delly v. Seaboard Citizens Nat'l Bank, 202 Va. 764, 767, 120 S.E.2d 457, 459 (1961)*; *Gooch v. Gooch, 134 Va. 21, 34, 113 S.E. 873, 877 (1922).*

### PRACTICE COMMENTARY

If this instruction is given, Instruction No. 48.020, Proper Execution, should also be given to inform the jury of the meaning and requirements of proper execution. If intent to revive is an issue, Instruction No. 48.030, Testamentary Intent, may be adapted for use.

### *ALERTS:*

- See the Practice Commentary for Instruction Nos. 48.050, Revocation, and 48.055, which addresses presumptions of revocation and loss.

### *RESEARCH REFERENCES:*

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.070**
**Undue Influence**

**A will is invalid if it is the result of undue influence. To constitute undue influence, the conscious and deliberate choice of the person executing the writing must be destroyed. The undue influence must be of such irresistible character as to control a person's mind, and amount to coercion or duress.**

## Sources & Authority

**Governing Statutes:** None.

**Case Authority:** *Parson v. Miller, 296 Va. 509, 524–30, 822 S.E.2d 169, 177–81 (2018)*; *Kim v. Seung Chong, 294 Va. 433, 435–36, 807 S.E.2d 216, 218–19 (2017)*; *Gelber v. Glock, 293 Va. 497, 524–30, 800 S.E.2d 800, 815–18, (2017)*; *Weedon v. Weedon*, 283 Va. 241, 255–256, 720 S.E.2d 552, 559–560 (2012); *Parish v. Parish, 281 Va. 191, 202–04, 704 S.E.2d 99, 105–06 (2011)*; *Dunn v. Strong, 216 Va. 205, 210–11, 217 S.E.2d 831, 834–35(1975)*; *Mullins v. Coleman, 175 Va. 235, 239, 7 S.E.2d 877, 878 (1940)*; *Redford v. Booker, 166 Va. 561, 574–75, 185 S.E. 879, 885 (1936)*; *Culpepper v. Robie, 155 Va. 64, 86, 154 S.E. 687, 695 (1930)*; *Jenkins v. Trice, 152 Va. 411, 429, 147 S.E. 251, 257 (1929)*; *Wallen v. Wallen, 107 Va. 131, 150, 57 S.E. 596, 599 (1907).*

### Practice Commentary

Although testamentary capacity and undue influence are different issues, there is some overlap in the evidence used to prove each. The facts and circumstances surrounding the execution of the will are critical. The age and the strength of mind and body of the decedent affect the amount of influence necessary to constitute undue influence. The fact that a major beneficiary wrote the will or that the decedent made an unnatural or unreasonable disposition of his property in favor of one who executed great influence on the decedent at about the time the will was drawn are all items to be considered by the jury.

With respect to wills, a presumption of undue influence arises when three elements are established: (1) the testator was old or enfeebled in mind when the will was executed, (2) the testator named a beneficiary who stood in a relationship of confidence or dependence, accompanied by activity in procuring a will favorable to the drafter, and (3) the testator had previously expressed a contrary intention to dispose of his property. *Parson, 296 Va. at 524, 822 S.E.2d at 177*; *Kim, 294 Va. at 435–36; 807 S.E.2d at 218* (the existence of a confidential relationship is insufficient, alone, to establish the second element); *Jarvis, 238 Va. at 120, 380 S.E.2d at 903.*

The presumption of undue influence shifts only the burden of production, not the burden of persuasion. *Parson, 296 Va. at 526, 822 S.E.2d at 178.* The contestant of a will always will retain the burden of persuasion. *Id., 822 S.E.2d at 179.*

If the presumption has been rebutted, the jury should not be instructed as to the presumption. *Id., 822 S.E.2d at 179.*

*Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 33, 597 S.E.2d 34, 39 (2004), which involved a lease agreement, and Gelber v. Glock, 293 Va. 497, 524–30,. 800 S.E.2d 800, 815–18, (2017), which involved an execution of a deed of gift and bill of sale*, discuss factors that may give rise to a presumption of undue influence.

A party may assert a claim of actual undue influence, even if the elements necessary to invoke the presumption of undue influence are not satisfied. *Kim, 294 Va. at 436 n.8, 807 S.E.2d at 219 n.8.*

Undue influence must be established by clear and convincing evidence, and the ultimate burden of proof is always upon him who alleges fraud. *Parson, 296 Va. at 527, 822 S.E.2d at 179*; *Gill, 219 Va. at 1106–07, 254 S.E.2d at 124–25.* However, circumstantial evidence may be sufficient to establish undue influence. *Kim, 294 Va. at 435 n.5, 807 S.E.2d at 218 n.5* (holding that no presumption of undue influence arose where drafter of will was not a beneficiary in the will even though the drafter had a confidential relationship with the testator).

☞ ***PRACTICE POINTER:*** Various relationships giving rise to a fiduciary relationship are set forth in *Martin, 235 Va. at 527–28, 369 S.E.2d at 399–400.*

☞ ***PRACTICE POINTER:*** On the issues of capacity and undue influence see also Instruction No. 48.040, Testamentary Capacity, and Instruction Nos. 45.460, Undue Influence, and 45.470, Duress.

### ***ALERTS:***

- To constitute undue influence, physical force or physical restraint does not need to be used. See *Dunn, 216 Va. at 210–11, 217 S.E.2d at 835.*

### ***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

**Instruction No. 48.090**
**Finding Instruction**

**You shall find the writing dated** (date of proponent's will) **to be the last will of** (name of decedent) **if the proponent proved by the greater weight of the evidence that:**

**(1) the writing was legally executed; and**

**(2)** (name of decedent) **intended it to be his will;** and

**(3)** (name of decedent) was capable of making a will at the time he executed the writing].

**You shall find that the writing dated** (date of proponent's will) **was not the last will of** (name of decedent) **if the proponent failed to prove any one or more of the elements above; or if the contestant proved by clear and convincing evidence that the writing dated** (date of proponent's will) **was revoked; or if the contestant proved by clear and convincing evidence that the writing dated** (date of proponent's will):

**(1) was the result of undue influence; or**

**(2) was the result of fraud.**

## SOURCES & AUTHORITY

**GOVERNING STATUTES:** None.

**CASE AUTHORITY:** *Kiddell v. Labowitz, 284 Va. 611, 628, 733 S.E.2d 622, 631 (2012)*; *Gibbs v. Gibbs, 239 Va. 197, 201–02, 387 S.E.2d 499, 501–02 (1990).*

### PRACTICE COMMENTARY

When a person has been adjudged insane, there is a prima facie presumption of lack of testamentary capacity. In this instance, clear and convincing evidence is necessary to overcome the presumption of lack of capacity. *Western State Hosp. v. Wininger, 196 Va. 300, 312, 83 S.E.2d 446, 453 (1954).*

This is an omnibus instruction designed to be adapted to specific cases. Any element not at issue should be eliminated from the instruction. Alternatively, the jury may be peremptorily instructed that the burden of proving a particular issue has been satisfied, e.g., "The writing dated (date of proponent's will) was legally executed."

### *ALERTS:*

- If the document or writing was intended by the decedent to constitute a will but was not executed in compliance with Va. Code Ann. § 64.2-403, then Va. Code Ann. § 64.2-404 provides the following exception:

> Although a document, or a writing added upon a document, was not executed in compliance with § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.
>
> The remedy granted by this section (i) may not be used to excuse compliance with any requirement for a testator's signature, except in circumstances where two persons mistakenly sign each other's will, or a person signs the self-proving certificate to a will instead of signing the will itself and (ii) is available only in proceedings brought in a circuit court under the appropriate provisions of this title, filed within one year from the decedent's date of death and in which all interested persons are made parties.

- The more exacting evidentiary requirement of clear and convincing evidence is not applied to attempts to establish testamentary incapacity. The contestant need only go forward with evidence sufficient to rebut the presumption of testamentary capacity, while the ultimate burden of persuasion remains with the proponent. Generally, as is set forth in this instruction, that burden requires proof by the greater weight of the evidence. As noted in the Practice Commentary, however, if a prima facie presumption of incapacity exists, the proponent must prove testamentary capacity by clear and convincing evidence. *Kiddell, 284 Va. at 623, 733 S.E.2d at 628*; *Gibbs, 239 Va. at 200–01, 387 S.E.2d at 501*; *Western State*

*Hosp., 196 Va. at 312, 83 S.E.2d at 453.*

• On the burden of proof regarding undue influence where a will proponent or beneficiary is in a confidential relationship with a testator, see *Redford v. Booker, 166 Va. 561, 585, 185 S.E. 879, 889–91 (1936).*

• In *Kiddell v. Labowitz, 284 Va. 611, 628, 733 S.E.2d 622, 631 (2012)*, the Supreme Court of Virginia held that "the determination of whether the presumption [of testamentary capacity] has been rebutted is to be determined by the jury, unless the opponent has rebutted the presumption as a matter of law." The Court also held that "[w]hen the proponent of a will enjoys the presumption of testamentary capacity, the jury must be instructed as to this presumption." *Id.* Finally, the Court held that the circuit court did not err in granting two jury instructions as to the existence of the presumption, the requirement that the opponents introduce evidence sufficient to rebut the presumption, and as to the burdens and standards of proof. *Id.*

• This Instruction and Instruction No. 48.040, Testamentary Capacity, should be adapted to include the issues and findings as may be applicable to a particular case.

***RESEARCH REFERENCES:***

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-8, 4-23, 4-24, 5-8, 15-16, 15-20, 19-10

T.W. Harrison & James P. Cox, III, HARRISON ON WILLS AND ADMINISTRATION, Chapters 1, 7, 8, 9, 10, 11, 14, 16

Kent Sinclair, VIRGINIA REMEDIES §§ 36-1, 43-11, 46-3, 49-5, 55-10, 57-6

MICHIE'S JURISPRUDENCE, Wills §§ 1 through 142

# Chapter 49

# CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

## Scope Note


**Instruction No. 49.000** "Sexually Violent Predator"—Finding Instruction

**Instruction No. 49.100** Standard of Proof—Clear and Convincing Evidence

**Instruction No. 49.200** Definition of "Sexually Violent Offense"

**Instruction No. 49.300** Definition of "Mental Abnormality" or "Personality Disorder"

**Instruction No. 49.400** Expert Opinion; Jury's Determination as to Sexually Violent Predator

# SCOPE NOTE

The following instructions relate to the determination of whether a prisoner may be civilly committed as a "sexually violent predator" under the Virginia Sexually Violent Predator Act (the "Act"), Va. Code Ann. §§ 37.2-900–37.2-921. The Act sets forth the procedures to be followed for the Commonwealth to have a prisoner who has been convicted of a sexually violent offense declared a sexually violent predator and face the possibility of involuntary commitment to a secure mental health facility upon release from prison. The Act also applies to defendants who have been charged with a sexually violent offense but who have been found unrestorably incompetent to stand trial. Although eligibility for civil commitment under the Act is triggered by conviction of a "sexually violent crime," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a trial. No one can be civilly committed as a sexually violent predator unless the Commonwealth meets the burden of proof required at each step. See, e.g., *Commonwealth v. Miller, 273 Va. 540, 552–53, 643 S.E.2d 208, 215–16 (2007).*

In *Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005)*, the Supreme Court of Virginia held that the Act survives constitutional scrutiny as it satisfies all of the requisite criteria set forth in *Kansas v. Crane, 534 U.S. 407, 409–10 (2002)* (affirming the constitutionality of civil commitment statutes where the statute provides for proper procedures and evidentiary safeguards, a finding of dangerousness to either the prisoner or to others, and proof that the dangerousness and lack of control is linked to the mental abnormality or personality disorder of the prisoner). Furthermore, the Act does not violate constitutional prohibitions against double jeopardy or *ex post facto* lawmaking as the Act is a civil statute and, from a constitutional standpoint, "nonpunitive." *Shivaee, 270 Va. at 126, 613 S.E.2d at 578.* Although the statute is a civil one, its provisions are strictly construed. *Townes v. Commonwealth, 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005).*

Pursuant to the Act, the Director of the Department of Corrections ("DOC") must maintain a database of prisoners in DOC custody who are incarcerated for sexually violent offenses or "serving or will serve concurrent or consecutive time for another offense in addition to time for a sexually violent offense." See Va. Code Ann. § 37.2-903(A). The Director is required to review the database on a monthly basis for the purpose of identifying those prisoners who are scheduled to be released within the next 24 months and who meet the criteria of a sexually violent predator. See Va. Code Ann. § 37.2-903(B). All prisoners who are so identified are referred to the Commitment Review Committee ("CRC"), which evaluates and assesses the prisoner, makes recommendations, and forwards those recommendations to the Attorney General. See Va. Code Ann. § 37.2-904. After receiving a recommendation from the CRC, the Attorney General has ninety days to conduct a review of the recommendation. Va. Code Ann. § 37.2-905(A). The Attorney General is vested with the discretion to file the petition for a civil commitment. See Va. Code Ann. § 37.2-905.

Upon the filing of a petition for civil commitment, the circuit court in which the prisoner was last convicted of a sexually violent offense is required to order the prisoner, now called respondent in the Commonwealth's petition, to remain in the custody of the DOC and must schedule a hearing within ninety days to determine if

there is probable cause to believe that the respondent is a sexually violent predator. See Va. Code Ann. § 37.2-906(A); *Rickman v. Commonwealth, 294 Va. 531, 536–539, 808 S.E.2d 395, 397–399 (2017)* (holding that Va. Code Ann. § 37.2-906(A)*'s* ninety-day hearing requirement is directory, not mandatory). At this time the court must also appoint counsel for the respondent if he is not otherwise represented by counsel. See Va. Code Ann. § 37.2-906(C). Within 120 days after the completion of a probable cause hearing, the circuit court must conduct a trial to determine whether the respondent who is the subject of the petition is a sexually violent predator. See Va. Code Ann. § 37.2-908(A). Both the Attorney General and the respondent have the right to a trial by jury, which, if demanded, will consist of seven jurors (from a panel of 13). In the case of a trial by jury, it is the role of the jury to find by clear and convincing evidence that the respondent is a sexually violent predator. To find the respondent a sexually violent predator the verdict must be unanimous. See Va. Code Ann. § 37.2-908(B). If the jury is not unanimous, the result is a mistrial. *Prieto v. Commonwealth, 278 Va. 366, 386, 682 S.E.2d 910, 920 (2009)*. In the event of a mistrial, the prisoner should remain in the custody of the Department of Corrections until another trial is conducted. See Va. Code Ann. § 37.2-908(G).

Instruction No. 49.000 sets forth the basic elements that the Commonwealth must prove at trial to establish that the respondent is a sexually violent predator. Specifically, the Commonwealth has the burden of proving that the respondent has been convicted of a sexually violent offense (the court makes the finding that the underlying offense is a sexually violent offense under the statute), that the respondent has a mental abnormality or personality disorder, and that as a result of this abnormality or disorder, the respondent finds it difficult to control his predatory behavior and is likely to engage in sexually violent acts. See Va. Code Ann. § 37.2-900; *Miller, 273 Va. at 551, 643 S.E.2d at 215*. The standard of proof for civil commitment as a sexually violent predator (Instruction No. 49.100) is clear and convincing evidence. See Va. Code Ann. § 37.2-908(C).

Instruction No. 49.400 concerns the admissibility of expert opinion as to whether the respondent is a sexually violent predator and provides that such expert opinion shall not be dispositive of the ultimate issue. See Va. Code Ann. § 37.2-908(C). Va. Code Ann. § 37.2-908(C) also designates specific requirements for the qualification of an expert witness, and mandates that such requirements must be satisfied before anyone will be permitted to testify as an expert. See *Miller, 273 Va. at 549–50, 643 S.E.2d at 213–14*. The expert must be a licensed psychiatrist or a licensed clinical psychologist skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC. See Va. Code Ann. §§ 37.2-904(B), 37.2-907(A). In preparation for trial, the respondent has a right to employ experts to perform mental examinations and to testify on his behalf. At the respondent's request, the court shall appoint experts deemed necessary to assist the respondent at trial. See Va. Code Ann. § 37.2-907(A).

Instruction No. 49.200 defines the term "sexually violent offense." Whether an offense qualifies as a sexually violent offense is a matter of law.

Instruction No. 49.300 defines "mental abnormality" or "personality disorder" as provided in Va. Code Ann. § 37.2-900. If the court or jury does not find the respondent to be a sexually violent predator, the respondent shall be returned to the custody of the DOC and shall be released upon his scheduled release date, or immediately if the

scheduled release date has already passed. However, upon a finding that the respondent is a sexually violent predator, the court must then determine whether the respondent should be committed or placed on conditional release. See Va. Code Ann. § 37.2-908(D) (setting forth factors the court may consider in making its determination). Any person committed as a sexually violent predator is held in the custody of the Department of Behavioral Health and Developmental Services until the person's mental abnormality or personality disorder has so changed that the person will not present an undue risk to public safety. See Va. Code Ann. § 37.2-909(A). The committing court must conduct a hearing twelve months after the date of commitment to assess the person's continued need for secure in-patient treatment. A hearing for assessment must be conducted at yearly intervals for five years and at biennial intervals thereafter. See Va. Code Ann. § 37.2-910(A). The statute's provision that annual assessment hearings be conducted by video conference whenever practicable is not unconstitutional on its face. Va. Code Ann. § 37.2-910(A); *Shellman v. Commonwealth, 284 Va. 711, 723, 733 S.E.2d 242, 249 (2012).*

## Instruction No. 49.000
## "Sexually Violent Predator"—Finding Instruction

**To prove that the respondent is a sexually violent predator, the Commonwealth must prove each of the following elements by clear and convincing evidence:**

**(1) That the respondent has been convicted of a sexually violent offense;**

**(2) That the respondent has a mental abnormality or personality disorder; and**

**(3) That, because of the mental abnormality or personality disorder, the respondent finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.**

**If you find from the evidence that the Commonwealth has proved each of these elements by clear and convincing evidence, then you shall find that the respondent is a sexually violent predator.**

**If the Commonwealth has failed to prove any one of these elements by clear and convincing evidence, then you must find that the respondent is not a sexually violent predator.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE:** Va. Code Ann. §§ 37.2-900, 37.2-908(C).

**CASE AUTHORITY:** *Commonwealth v. Proffitt, 292 Va. 626, 635, 792 S.E.2d 3, 7 (2016)*; *Gibson v. Commonwealth, 287 Va. 311, 314 n.1, 316, 756 S.E.2d 460, 462 n.1, 463 (2014)*; *Commonwealth v. Miller, 273 Va. 540, 551, 643 S.E.2d 208, 214–15 (2007)*; *Commonwealth v. Allen, 269 Va. 262, 275–76, 609 S.E.2d 4, 13 (2005)*; *McCloud v. Commonwealth, 269 Va. 242, 256, 609 S.E.2d 16, 19 (2005)*.

☞ ***PRACTICE POINTER:*** The determination that the underlying offense is a sexually violent offense under this statute is an issue for the courts to decide as a matter of law. Va. Code Ann. § 37.2-900. See Instruction No. 49.200.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses § 27

## Instruction No. 49.100
## Standard of Proof—Clear and Convincing Evidence

**The Commonwealth has the burden of proving that the respondent is a sexually violent predator by clear and convincing evidence.**

**When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proved the issue.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE:** Va. Code Ann. § 37.2-908(C).

**CASE AUTHORITY:** *Commonwealth v. Proffitt, 292 Va. 626, 635, 792 S.E.2d 3, 7 (2016)*; *Gibson v. Commonwealth, 287 Va. 311, 316, 756 S.E.2d 460, 463 (2014)*; *DeMille v. Commonwealth, 283 Va. 316, 324–25, 720 S.E.2d 69, 73–74 (2012)*; *Commonwealth v. Squire, 278 Va. 746, 752, 685 S.E.2d 631, 633–34 (2009)*; *Commonwealth v. Miller, 273 Va. 540, 551, 643 S.E.2d 208, 215 (2007)*; *Higgins v. Bowdoin, 238 Va. 134, 142, 380 S.E.2d 904, 909 (1989)*; *Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 540–41, 211 S.E.2d 88, 92 (1975)*.

### PRACTICE COMMENTARY

The burden to prove by clear and convincing evidence that the respondent is likely to engage in sexually violent acts is an issue of fact to be determined based upon consideration of the whole record. It is not necessary that an expert state with specificity that respondent will likely engage in sexually violent acts in the future. *DeMille, 283 Va. at 324–25, 720 S.E.2d at 73–74.*

The *Lucas* case apparently represents the first time that the Court has expounded on the familiar phrase "clear and convincing evidence."

> Clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*."

*Lucas, 215 Va. at 541, 211 S.E.2d at 92* (quoting *Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954)*) (emphasis in original).

☞ ***PRACTICE POINTER*:** No reference is made in this instruction to clear and convincing evidence being an intermediate standard of proof. To tell the jury that this standard is in between the greater weight of the evidence and the beyond a reasonable doubt standards would require defining those standards for the jury, thereby confusing the applicable standard, rather than clarifying it.

☞ ***PRACTICE POINTER:*** The Supreme Court of Virginia has explained that "it is the quality, not the quantity, of the evidence which determines whether a particular standard of proof is met." *Gulfstream Bldg. Assoc., Inc. v. Britt, 239 Va. 178, 184, 387 S.E.2d 488, 491 (1990)* (rejecting appellee's argument that "the record [wa]s so 'sparse' that it could not meet the required clear and convincing standard of proof).

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA, Chapters 1 through 4

Charles E. Friend & Kent Sinclair, FRIEND'S VIRGINIA PLEADING AND PRACTICE, Chapters 25 & 26

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 5-1 through 5-8

Kent Sinclair, VIRGINIA REMEDIES, Chapter 25

MICHIE'S JURISPRUDENCE, Evidence §§ 29 through 33; Negligence §§ 1 through 69

**Instruction No. 49.200**
**Definition of "Sexually Violent Offense"**

**You have heard evidence that the respondent was convicted of the offense of** (name of offense) **in the** (name of court convicting respondent of aforementioned offense)**. I am instructing you that, as a matter of law, this offense is a sexually violent offense.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE:** Va. Code Ann. § 37.2-900.

**CASE AUTHORITY:** None.

**PRACTICE COMMENTARY**

None.

***ALERTS:***

None.

***RESEARCH REFERENCES:***

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses § 27

## Instruction No. 49.300
## Definition of "Mental Abnormality" or "Personality Disorder"

**A "mental abnormality" or "personality disorder" is a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE:** Va. Code Ann. § 37.2-900.

**CASE AUTHORITY:** *DeMille v. Commonwealth, 283 Va. 316, 324, 720 S.E.2d 69, 73 (2012)*; *Commonwealth v. Squire, 278 Va. 746, 751–52, 685 S.E.2d 631, 633–34 (2009)*; *Commonwealth v. Miller, 273 Va. 540, 551–52, 643 S.E.2d 208, 215 (2007)*; *Shivaee v. Commonwealth, 270 Va. 112, 122–23, 613 S.E.2d 570, 576 (2005)*.

### PRACTICE COMMENTARY

***Juror polling.*** Unlike elements of crimes and offenses generally, the law does not usually require juror unanimity regarding underlying sub-elements. See *Jackson v. Commonwealth, 266 Va. 423, 434–35, 587 S.E.2d 532, 541 (2003)* (citing *Richardson v. United States, 526 U.S. 813, 817 (1999)*) (stating that juror unanimity is required as to each discrete element of an offense, but no such unanimity is required as to the underlying facts or circumstances that make up a particular element). Thus, it appears that triers of fact are not required to agree as to which mental abnormality or personality disorder was proven by the evidence, but only that they unanimously agree that the respondent suffers from at least one.

### *ALERTS:*

None.

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses § 27

## Instruction No. 49.400
## Expert Opinion; Jury's Determination as to Sexually Violent Predator

**Mental health experts are permitted to testify at the trial regarding their diagnoses and their opinions as to whether the respondent meets the definition of a sexually violent predator. However, such opinions shall not be dispositive of whether the respondent is a sexually violent predator; you are to make the determination of whether the respondent is a sexually violent predator based upon all the evidence.**

## SOURCES & AUTHORITY

**GOVERNING STATUTE:** Va. Code Ann. § 37.2-908(C).

**CASE AUTHORITY:** *DeMille v. Commonwealth, 283 Va. 316, 324–25, 720 S.E.2d 69, 74 (2012)*; *Commonwealth v. Miller, 273 Va. 540, 549–50, 643 S.E.2d 208, 214 (2007).*

### PRACTICE COMMENTARY

In proceedings under the Sexually Violent Predators Act, "it is not necessary for an expert to state with specificity that the respondent will likely engage in sexually violent acts in the future. Rather, the determination of whether the respondent is likely to engage in sexually violent acts as defined in Va. Code Ann. § 37.2-900 by clear and convincing evidence is an issue of fact to be determined by the court or jury upon consideration of the whole record." *DeMille, 283 Va. at 324–25, 720 S.E.2d at 74.*

"The burden of proof by clear and convincing evidence rests on the Commonwealth, not the respondent, and never shifts." *Gibson v. Commonwealth, 287 Va. 311, 319, 756 S.E.2d 460, 464–65 (2014).*

### *ALERTS:*

- Counsel should ensure that any expert witness meets the detailed statutory qualifications set forth in Va. Code Ann. § 37.2-904(B) [or Va. Code Ann. § 37.2-907(A)] for expert testimony in this area. *Miller, 273 Va. at 550, 643 S.E.2d at 214*; see also *Commonwealth v. Allen, 269 Va. 262, 273–74, 609 S.E.2d 4, 11–12 (2005)* ("Where a statute designates express qualifications for an expert witness, the witness must satisfy the statutory criteria in order to testify as a witness.").

- Experts should be cautious in testifying as to reliance on and assumptions about unadjudicated criminal charges. Compare *Lawrence v. Commonwealth, 279 Va. 490, 689 S.E.2d 748 (2010)* with *Boyce v. Commonwealth, 279 Va. 644, 691 S.E.2d 782 (2010).* However, the Supreme Court of Virginia has held that it is reversible error to exclude the testimony of two witnesses who would have testified to two separate, but strikingly similar, incidents of sexual assault by the defendant occurring five years apart, and resulting in a rape conviction for the more recent offense. *Commonwealth v. Proffitt, 292 Va. 626, 636–41, 792 S.E.2d 3, 7–10 (2016).* The Court found that "the excluded testimony was probative of whether [the defendant] finds it difficult to control his predatory behavior and is likely to commit sexually violent offenses in the future," particularly as the United States Supreme Court has recognized that previous instances of violent behavior are an important indicator of future violent tendencies. *Id. at 637, 792 S.E.2d at 11* (citing *Kansas v. Hendricks, 521 U.S. 346, 358 (1997)*), Further, the Supreme Court found that the testimony from the victim of the earlier incident would have strengthened the expert's diagnosis of sexual sadism disorder and would have shown that the "disorder was more extensive than the evidence otherwise established." *Id.*

### *RESEARCH REFERENCES:*

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses § 27

# TABLE OF CASES

[References are to pages]

## A


A.H. v. Church of God in Christ, Inc., 297 Va. 604, 831 S.E.2d 460 . . . . . 8-8; 8-10; 8-14; 8-16; 8-22

A.R.A. v. Commonwealth, 295 Va. 153, 809 S.E.2d 660 (2018). . . . . .36-10

Abernathy v. Emporia Mfg. Co., 122 Va. 406, 95 S.E. 418 (1918). . . . . .1-3; 2-26

Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 699 S.E.2d 483 (2010). . 39-6; 39-10, 39-11; 45-106

Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P., 263 Va. 377, 560 S.E.2d 246 (2002). 8-2; 9-14, 9-15; 47-12; 47-16

Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000). . . . . .9-2; 9-5; 9-14, 9-15

Adams v. Adams, 233 Va. 422, 357 S.E.2d 491 (1987) . . . . . 2-54

Adams v. Commonwealth, 163 Va. 1053, 178 S.E. 29 (1935). . . . . .36-14

Adams v. Hazen, 123 Va. 304, 96 S.E. 741 (1918) . 45-44; 45-46

Adams, Payne & Gleaves, Inc. v. Indiana Wood Preserving Co., 154 S.E. 558, 155 Va. 18 (1930). 45-112

ADC Fairways Corp. v. Johnmark Constr., Inc., 231 Va. 312, 343 S.E.2d 90. . . . . .45-116

Adelman v. Caputi, 212 Va. 94, 181 S.E.2d 608 (1971). . . . . .43-4, 43-5

Advanced Marine Enters. v. PRC, Inc., 256 Va. 106, 501 S.E.2d 148 (1998). . . . . .40-3; 40-16; 40-20

AES Corp. v. Steadfast Ins. Co., 283 Va. 609, 725 S.E.2d 532 (2012). . . . . .47-66; 47-70

Aetna Cas. & Sur. Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869. . . . . .47-84

Aetna Cas. & Sur. Co. v. Goldman, 217 Va. 419, 229 S.E.2d 863. . . . . .47-40

Aetna Cas. & Sur. Co. v. Harris, 218 Va. 571, 239 S.E.2d 84. . . . . .47-52

Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 146 S.E.2d 220. . . . . .47-88

Aetna Casualty & Surety Co. v. Anderson, 200 Va. 385, 105 S.E.2d 869 (1958). . . . . .47-84

Aetna Casualty & Surety Co. v. Goldman, 217 Va. 419, 229 S.E.2d 863 (1976). . . . . .47-40

Aetna Casualty & Surety Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1966). . . . . .47-88

Agostini v. Consolvo, 154 Va. 203, 153 S.E. 676 (1930). . . . . .45-28, 45-29

Akers v. Mathieson Alkali Works, 144 S.E. 492, 151 Va. 1 (1928) . . . . . 23-34

Alban Tractor Co. v. Sheffield, 220 Va. 861, 263 S.E.2d 67 (1980) . . . . . 8-36; 8-38

AlBritton v. Commonwealth, 299 Va. 392, 853 S.E.2d 512 (2021). . . . . .5-4; 6-16; 23-14; 32-6

Alexakis v. Mallios, 261 Va. 425, 544 S.E.2d 650 (2001) . . . . . 44-6; 44-12; 45-18

Alexander v. Hill, 6 S.E.2d 661, 174 Va. 248 (1940). . . . . .35-22

Alexandria Gazette Corp. v. West, 198 Va. 154, 93 S.E.2d 274. . . . . .37-33

Alfonso v. Robinson, 257 Va. 540, 514 S.E.2d 615. . 4-30; 11-6

Allen v. Aetna Cas. & Sur. Co., 222 Va. 361, 281 S.E.2d 818. . . . . .45-46

Allen v. Brooks, 203 Va. 357, 124 S.E.2d 18 (1962). 10-24

Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) . . . . . 2-58

Allen & Rocks, Inc. v. Dowell, 252 Va. 439, 477 S.E.2d 741. . . . . .37-15; 37-30

Allen Realty Corp. v. Holbert, 227 Va. 441, 318 S.E.2d 592. . . . . .39-10; 40-16; 40-20

Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013) . . . . . 9-8

Allied Prods. v. Duesterdick, 217 Va. 763, 232 S.E.2d 774 (1977). . . . . .42-10

Allison v. Brown, 293 Va. 617, 801 S.E.2d 761 (2017) . . . . . 1-12; 35-32

Allmond, 220 Va. 235, 257 S.E.2d 832 . . . . . 46-38

Allstate Ins. Co. v. Charity, 255 Va. 55, 496 S.E.2d 430. . . . . .47-52

Allstate Ins. Co. v. Gauthier, 273 Va. 416, 641 S.E.2d 101 (2007). . . . . .47-42; 47-76

Allstate Ins. Co. v. Wade, 265 Va. 383, 579 S.E.2d 180 (2003). . . . . .9-32; 9-34; 15-8

Almy v. Grisham, 273 Va. 68, 639 S.E.2d 182, 639 S.E.2d 68 (2007). . . . . .33-10; 33-14

Alpaugh v. Wolverton, 184 Va. 943, 36 S.E.2d 906 (1946) . . . . . 25-4

Am. Ins. Co. v. Damascus Lumber Co., 139 Va. 380, 124 S.E. 269 . . . . . 45-52

Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 6 S.E.2d 562 (1939). . . . . .47-12

Ambrose v. Acacia Mut. Life Ins. Co., 190 Va. 189, 56 S.E.2d 372 . . . . . 47-28; 47-36

American Agric. Chem. Co. v. Kennedy, 103 Va. 171, 48 S.E. 868 . . . . . 45-50

American Communications Network, Inc. v. Williams, 264 Va. 336, 568 S.E. 2d 683 (2002). . . . . .37-13

[References are to pages]

American Ins. Co. v. Damascus Lumber Co., 139 Va. 380, 124 S.E. 269 (1924) . . . . . 45-52
American Liberty Ins. Co. v. Breslerman, 201 Va. 822, 113 S.E.2d 862 (1960) . . . . . 47-24
American Nat'l Ins. Co. v. Dozier, 172 Va. 376, 2 S.E.2d 282 (1939) . . . . . 47-66
American Realty Trust v. Chase Manhattan Bank, 222 Va. 392, 281 S.E.2d 825 . . . . . 45-62; 45-74
American Reliance Ins. Co. v. Mitchell, 238 Va. 543, 385 S.E.2d 583 (1989) . . . . . 47-76
American-Lafrance & Foamite Industries, Inc. v. Arlington County, 169 Va. 1, 192 S.E. 758 (1937) . . . . . 45-56
Ames v. American Nat'l Bank, 163 Va. 1, 176 S.E. 204 . . . . . 45-52
Amos v. NationsBank, N.A., 256 Va. 344, 504 S.E.2d 365 . . . . . 23-30; 24-20
Ampy v. Metropolitan Cas. Ins. Co., 200 Va. 396, 105 S.E.2d 839 . . . . . 47-36
Amusement Slides Corp. v. Lehmann, 217 Va. 815, 232 S.E.2d 803 (1977) . . . . . 6-4; 6-26
Anderson v. Commonwealth, 282 Va. 457, 717 S.E.2d 623 (2011) . . . . . 2-30
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) . . . . . 37-8
Anderson v. Payne, 189 Va. 712, 54 S.E.2d 82 (1949) . . . . . 10-22
Anderson v. Wis. Cent. Transp. Co., 327 F. Supp. 2d 969 (E.D. Wisc. 2004) . . . . . 18-46; 18-50
Anderson, 212 Va. 705, 187 S.E.2d 148 . . . . . 46-20
Andrews v. American Health & Life Ins. Co., 236 Va. 221, 372 S.E.2d 399 (1988) . . . . . 47-60
Andrews v. Appalachian Elec. Power Co., 192 Va. 150, 63 S.E.2d 750 . . . . . 7-12; 30-8
Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780. . 37-12; 40-17; 41-20; 41-24
Andrews, 192 Va. 150, 63 S.E.2d 750 . . . . . 7-13
Anthony v. Verizon Va., Inc., 288 Va. 20, 758 S.E.2d 527, 199 LRRM 3639 . . . . . 33-4; 33-8
APCO v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972) . . . . . 46-14
Appalachian Elec. Power Co. v. Gorman, 191 Va. 344, 61 S.E.2d 33 . . . . . 46-20; 46-24; 46-36
Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972) . . . . 46-8; 46-10; 46-20; 46-34
Appalachian Power Co. v. Gorman, 191 Va. 344, 61 S.E.2d 33 . . . . . 46-24; 46-36
Appalachian Power Co. v. John Stewart Walker, Inc., 214 Va. 524, 201 S.E.2d 758 (1974) . . . 45-110; 45-112
Appalachian Power Co. v. Johnson, 137 Va. 12, 119 S.E. 253 (1923) . . . . . 46-18; 46-20
Appalachian Power Co. v. La Force, 214 Va. 438, 201 S.E.2d 768 (1974) . . . . . 23-8; 23-22; 23-26; 30-4
Appalachian Power Co. v. Sanders, 232 Va. 189, 349 S.E.2d 101 (1986) . . . . . 23-14
Appalachian Power Co., 214 Va. 438, 201 S.E.2d 768 . . . . . 30-4
Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518 (4th Cir. 1980) . . . . . 37-7
Arkla Lumber & Mfg. Co., 146 Va. 641, 132 S.E. 840 . . . . . 45-78
Armentrout v. French, 220 Va. 458, 258 S.E.2d 519. 39-24
Arminius Chem. Co. v. Landrum, 113 Va. 7, 73 S.E. 459 (1912) . . . . . 9-18
Armstead v. James, 220 Va. 171, 257 S.E.2d 767 (1979) . . . . . 9-4; 9-18
Arndt v. Russillo, 231 Va. 328, 343 S.E.2d 84 (1986). 6-4; 6-26, 6-27
Arney v. Bogstad, 199 Va. 460, 100 S.E.2d 749 (1957) . . . . . 10-78; 10-80; 14-12
Arrington v. Graham, 203 Va. 310, 124 S.E.2d 199 (1962) . . . . . 15-14
Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 397 S.E.2d 821 . . . . . 6-4; 6-26; 23-30; 24-20
Ashbury v. City of Norfolk, 152 Va. 278, 147 S.E. 223 (1929) . . . . . 31-5
Ashby v. Faison & Assocs., 247 Va. 166, 440 S.E.2d 603 (1994) . . . . . 6-24; 23-14; 23-16
Ashmore v. Herbie Morewitz, Inc., 252 Va. 141, 475 S.E.2d 271 (1996) . . . . . 3-14
Ashworth v. Baker, 197 Va. 582, 90 S.E.2d 860 (1956) . . . . . 8-6
Askew v. Collins, 283 Va. 482, 722 S.E.2d 249 (2012) . . . . . 37-52
Atkins v. Boatwright, 204 Va. 450, 132 S.E.2d 450 (1963) . . . . . 44-10
Atkinson v. Life Ins. Co., 217 Va. 208, 228 S.E.2d 117 (1976) . . . . . 47-92
Atkinson v. S.L. Nusbaum & Co., 191 Va. 82, 59 S.E.2d 857 . . . . . 43-12; 43-16; 43-18
Atkinson v. Sachno, 261 Va. 278, 541 S.E.2d 902 (2001) . . . . . 8-28
Atkinson v. Scheer, 256 Va. 448, 508 S.E.2d 68 (1998) . . . . . 5-4; 5-10
Atlantic & D. R. Co. v. Hooker, 74 S.E.2d 270, 194 Va. 496 (1953) . . . . . 45-18
Atlantic & Danville R.R. Co. v. Reiger, 95 Va. 418, 28 S.E. 590 (1897) . . . . . 1-12
Atlantic & Danville Ry. Co. v. Hooker, 194 Va. 496, 74 S.E.2d 270 . . . . . 45-18
Atlantic Co. v. Roberts, 179 Va. 669, 20 S.E.2d 520 (1942) . . . . . 1-12
Atlantic Coast Line R.R. v. Withers, 192 Va. 493, 65 S.E.2d 654 . . . . . 13-4

[References are to pages]

Atlantic Coast Line R.R. Co. v. Clements, 184 Va. 656, 36 S.E.2d 553 (1946) . . . . . 18-30; 18-44
Atlantic Coast Line R.R. Co. v. Withers, 65 S.E.2d 654, 192 Va. 493 (1951) . . . . . 13-4; 18-12
Atlantic Greyhound Corp. v. Shelton, 36 S.E.2d 625, 184 Va. 684 (1946) . . . . . 17-20
Atlantic Life Ins. Co. v. Worley, 161 Va. 951, 172 S.E. 168 (1934) . . . . . 47-72
Atrium Unit Owners Ass'n v. King, 266 Va. 288, 585 S.E.2d 545 (2003) . . . . . 5-4
Atwell v. Watson, 204 Va. 624, 133 S.E.2d 552 (1963) . . . . . 10-72; 10-92
Austin v. Shoney's, Inc., 254 Va. 134, 486 S.E.2d 285 . . . . . 23-14; 23-16
Autumn Ridge, L.P. v. Acordia of Va. Ins. Agency, Inc., 270 Va. 83, 613 S.E.2d 435 (2005) . . . . . 47-28
Avent v. Commonwealth, 279 Va. 175, 688 S.E.2d 244 (2010) . . . . . 36-14
Averett v. Shircliff, 218 Va. 202, 237 S.E.2d 92 (1977) . . . . . 9-24; 9-28; 9-30
Ayers v. Mosby, 256 Va. 228, 504 S.E.2d 845 (1998) . . . . . 45-16; 45-44
Aylor v. Gibbs, 143 Va. 644, 129 S.E. 696 (1925) 37-11
Ayres v. Harleysville Mut. Cas. Co., 172 Va. 383, 2 S.E.2d 303 . . . . . 47-29
Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 . 41-6; 41-20

## B

B.G. Young & Sons, Inc. v. Kirk, 202 Va. 176, 116 S.E.2d 38 (1960) . . . . . 4-10
Bailey v. Central V. Ry., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943) . . . . . 21-2
Bailey v. Henderson, 240 Va. 1, 392 S.E.2d 681 (1990) . . . . . 9-5
Bailey v. Kerns, 246 Va. 158, 431 S.E.2d 312 (1993) 2-28; 48-10
Bailey v. Turnbow, 273 Va. 262, 639 S.E.2d 291 (2007) . . . . . 45-100
Baines v. Parker, 217 Va. 100, 225 S.E.2d 403 (1976) . . . . . 2-20
Baise v. Warren, 158 Va. 505, 164 S.E. 655 (1932) . 4-16; 4-20
Baker v. Carrington, 138 Va. 22, 120 S.E. 856 (1924) . . . . . 9-32
Baker v. Elmendorf, 271 Va. 474, 628 S.E.2d 358 41-6; 41-14; 41-16; 41-18; 41-24; 41-26; 41-28
Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617 (1960) . . . . . 4-31; 15-4
Baker v. Poolservice, Co., 272 Va. 677, 636 S.E.2d 360 . . . . . 34-46; 34-54
Baker v. Taylor, 229 Va. 66, 326 S.E.2d 669 (1985) 15-4
Baldwin v. McConnell, 273 Va. 650, 643 S.E.2d 703 (2007) . . . . . 9-8; 9-32; 9-34; 9-38
Ball v. Takeda Pharms. Am., Inc., 963 F. Supp. 2d 497 (E.D. Va. 2013) . . . . . 34-54
Ballagh v. Fauber Enters., 290 Va. 120, 773 S.E.2d 366 (2015) . . . . . 39-3; 39-30
Balt. & Ohio R.R. Co. v. Wightman's Adm'r, 70 Va. 431 (1877) . . . . . 9-14
Bangley v. Virginian Ry. Co., 195 Va. 340, 78 S.E.2d 696 (1953) . . . . . 2-52; 18-44
Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd., 215 Va. 180, 207 S.E.2d 858 (1974) . . . . . 44-6
Bankers Credit Serv. of Vermont v. Dorsch, 231 Va. 273, 343 S.E.2d 339 . . . . . 45-24
Banks v. Bradley, 192 Va. 598, 66 S.E.2d 526 (1951) . . . . . 36-14, 36-15; 36-18; 36-20
Banks v. City of Richmond, 232 Va. 130, 348 S.E.2d 280 . . . . . 5-4
Banks v. Harris, 238 Va. 81, 380 S.E.2d 634 (1989) . 2-24
Banks v. Mario Indus., 274 Va. 438, 650 S.E.2d 687 (2007) . . . . . 9-6; 9-32; 9-38
Banks v. Richmond, 232 Va. 130, 348 S.E.2d 280 (1986) . . . . . 5-4
Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982) . . . . . 31-6
Banner v. Commonwealth, 133 S.E.2d 305, 204 Va. 640 (1963) . . . . . 1-2; 1-7; 36-20; 38-11
Banovitch v. Commonwealth, 196 Va. 210, 83 S.E.2d 369 (1954) . . . . . 36-14
Barbour v. Barbour, 155 Va. 650, 156 S.E. 365 . . 39-34
Barcroft Woods, Inc. v. Francis, 201 Va. 405, 111 S.E.2d 512 (1959) . . . . . 45-26
Barden, 200 Va. 98, 104 S.E.2d 13 . . . . . 18-32
Barham v. Virginia Nat'l Bank, 206 Va. 153, 142 S.E.2d 569 (1965) . . . . . 4-26
Barkley v. Wallace, 267 Va. 369, 595 S.E.2d 271 (2004) . . . . . 9-5
Barnard v. Gardner Inv. Corp., 129 Va. 346, 106 S.E. 346 (1921) . . . . . 43-22
Barnes v. Bess, 171 Va. 1, 197 S.E. 403 (1938) . 48-14
Barnes v. Commonwealth, 190 Va. 732, 58 S.E.2d 12 (1950) . . . . . 2-52
Barnes v. Graham Va. Quarries, Inc., 204 Va. 414, 132 S.E.2d 395 . . . . . 26-6; 30-2; 45-110
Barnes v. Moore, 199 Va. 227, 98 S.E.2d 683 (1957) . . . . . 27-2, 27-3; 27-10; 27-12; 27-14
Barnes, 97 Va. 372, 34 S.E. 93 . . . . . 45-82; 45-96
Barnett v. Mobile County Personnel Bd., 536 So. 2d 46 . . . . . 37-3
Barnette v. Dickens, 205 Va. 12, 135 S.E.2d 109 (1964) . . . . . 2-24
Barry v. Tyler, 171 Va. 381, 199 S.E. 496 . . . . . 17-4

[References are to pages]

Bartz v. Board of Supervisors, 237 Va. 669, 379 S.E.2d 356 . . . . . 46-16
Basilotta v. Barker, 222 Va. 683, 283 S.E.2d 220 (1981). . . . . 14-12
Bates v. Thompson, 200 Va. 501, 106 S.E.2d 728 (1959) . . . . . 15-4
Bauer v. Harn, 223 Va. 31, 286 S.E.2d 192 (1982) . 23-8; 23-10
Baumann v. Capozio, 269 Va. 356, 611 S.E.2d 597 (2005). . . . . 45-86
Baxley v. Fischer, 204 Va. 792, 134 S.E.2d 291 (1964) . . . . . 7-4, 7-5
Bayliner Marine Corp. v. Crow, 257 Va. 121, 509 S.E.2d 499 (1999) . . . . . 34-14; 34-16; 34-20
Baylor v. Hoover, 131 Va. 435, 109 S.E. 578 (1921) . . . . . 43-4
Bayne v. Tharpe, 201 Va. 484, 111 S.E.2d 816 (1960) . . . . . 14-8
Beach v. Turim, 287 Va. 223, 754 S.E.2d 295 (2014) . . . . . 23-6
Beale v. Jones, 210 Va. 519, 171 S.E.2d 851 (1970).5-4
Bear v. Parrish, 148 Va. 754, 139 S.E. 488 (1927).43-4; 43-6
Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 491 S.E.2d 731 (1997) . . . 34-20
Beasley v. Barnes, 201 Va. 593, 113 S.E.2d 62 (1960). . . . . 10-41
Beasley v. Bosschermuller, 206 Va. 360, 143 S.E.2d 881 (1965). . . . . 9-4; 10-41
Beasley v. Whitehurst, 152 Va. 305, 147 S.E. 194 (1929) . . . . . 8-26
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S. Ct. 197, 19 L. Ed. 2d 248 (1967).37-7; 37-18; 37-22
Bedget v. Lewin, 202 Va. 535, 118 S.E.2d 650 (1961). . . . . 10-26
Bell v. Commonwealth, 167 Va. 526, 189 S.E. 441 (1937) . . . . . 2-38
Bell v. Kirby, 226 Va. 641, 311 S.E.2d 799 (1984) . . 2-44; 9-9
Benefiel v. Walker, 244 Va. 488, 422 S.E.2d 773 (1992) . . . . . 6-27
Bennett v. Sage Payment Solutions, Inc., 282 Va. 49, 710 S.E.2d 736 (2011) . . . . . 45-83
Bentley v. Felts, 248 Va. 117, 445 S.E.2d 131 (1994).7-4; 10-86; 17-12
Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C., 269 Va. 315, 609 S.E.2d 49 (2005). . . . . 45-74
Bergmueller v. Minnick, 238 Va. 332, 383 S.E.2d 722 . . . . . 39-24
Berlin v. Wall, 122 Va. 425, 95 S.E. 394 (1918) . . 24-6
Berry v. Klinger, 225 Va. 201, 300 S.E.2d 792 (1983). . . . . 45-62
Berry v. Smith, 139 S.E. 252, 148 Va. 424 (1927) . 38-6
Berry v. Trible, 271 Va. 289, 626 S.E.2d 440. . . 48-10; 48-15, 48-16
Besser Co. v. Hansen, 243 Va. 267, 415 S.E.2d 138 (1992). . . 34-20; 34-26; 34-36; 34-44; 34-58; 34-62
Beverly Enters.-Va., Inc. v. Nichols, 247 Va. 264, 441 S.E.2d 1 (1994) . . . . 5-4; 35-3; 35-8; 35-22; 35-46
Bialk v. City of Hampton, 242 Va. 56, 405 S.E.2d 619 . . . . . 31-2, 31-3; 31-5
Bibb's Adm'r v. Norfolk & W. R.R. Co., 87 Va. 711, 14 S.E. 163 (1891) . . . . . 8-30
Bickley v. Farmer, 215 Va. 484, 211 S.E.2d 66 (1975) . . . . . 12-6; 12-12; 12-16
Biggs v. Martin, 210 Va. 630, 172 S.E.2d 767 (1970). . . . . 10-18
Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 244 S.E.2d 767 (1978). . . . 41-6; 41-16; 41-20; 41-24
Biospherics, Inc. v. Forbes, 151 F.3d 180 . . . . . 37-11
Birtcherd Dairy, 197 Va. 830, 91 S.E.2d 421. . . 10-104
Bissett Realty, Inc. v. Moyer, 223 Va. 475, 290 S.E.2d 851 (1982). . . . . 43-5
Bituminous Cas. Corp. v. Baldwin, 196 Va. 1020, 86 S.E.2d 836 . . . . . 47-12; 47-18; 47-32
Bituminous Casualty Corp. v. Sheets, 239 Va. 332, 389 S.E.2d 696 (1990) . . . . . 47-42
Black v. Bladergroen, 258 Va. 438, 521 S.E.2d 168 (1999) . . . . . 35-2; 35-8; 35-12; 35-22
Blair v. Baltimore & O. R. Co., 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945) . . . . . 21-8
Blair Constr. v. Weatherford, 253 Va. 343, 485 S.E.2d 137 . . . . . 39-10; 39-18; 39-42
Blake Constr. Co. v. Alley, 233 Va. 31, 353 S.E.2d 724 (1987). . . . . 35-48
Bland v. Commonwealth, 177 Va. 819, 13 S.E.2d 317 (1941) . . . . . 2-38
Blankenship v. Childress, 183 Va. 13, 31 S.E.2d 302 (1944) . . . . . 43-4
Blanks v. Gordon, 117 S.E.2d 82, 202 Va. 295 (1960) . . . . . 41-2
Blevins v. Sheshadri, 313 F. Supp.2d 598 (W.D. 2004) . . . . . 35-38
Blondel v. Hays, 241 Va. 467, 403 S.E.2d 340 (1991). . . . . 1-3; 4-14; 5-5; 35-3
Bloomberg-Michael Furniture Co. v. Coppes Bros. & Zook, 141 Va. 18, 126 S.E. 59 (1925) . . 45-8; 45-29
Bloxom v. McCoy, 178 Va. 343, 17 S.E.2d 401 (1941). . . . . 7-5
Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989). . . . . 37-7
Blue Ridge Serv. Corp. v. Saxon Shoes, Inc., 271 Va. 206, 624 S.E.2d 55 (2006). . . . . 5-4

[References are to pages]

Blue Stone Land Co. v. Neff, 259 Va. 273, 526 S.E.2d 517 . . . . . 45-120
Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976). 35-32
Bly v. Southern R. Co., 183 Va. 162, 31 S.E.2d 564 (1944). . . . . .2-28; 21-3; 21-6
Bly v. Southern R. Co., 183 Va. 406, 32 S.E.2d 659 (1945). . . . . .21-3; 21-6
Bly v. Southern Ry. Co., 183 Va. 162, 31 S.E.2d 564. . . . . .21-3
BMW of N. Am. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). . . . . .9-35
Board of County Supervisors v. Sie-Gray Developers, Inc., 230 Va. 24, 334 S.E.2d 542 (1985). . . . .45-4
Board of County Supervisors v. Wilkerson, 226 Va. 84, 307 S.E.2d 450 (1983) . . . . . 46-4; 46-20
Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc., 230 Va. 24, 334 S.E.2d 542. . . . . .45-4
Board of Supervisors v. Parsons, 245 Va. 489, 428 S.E.2d 905 (1993) . . . . . .46-42
Board of Trade Bldg. Corp. v. Cralle, 109 Va. 246, 63 S.E. 995 (1909). . . . . .8-24
Boatright v. Peaks, 190 Va. 768, 57 S.E.2d 895 (1950). . . . . .45-82
Bogese, Inc. v. State Highway and Transp. Comm'r, 250 Va. 226, 462 S.E.2d 345 (1995) . . . . . 46-3
Boggs v. Duncan, 202 Va. 877, 121 S.E.2d 359 (1961). . . . . .45-94
Bogstad v. Hope, 100 S.E.2d 745, 199 Va. 453 (1957). . . . . .15-2; 15-4
Bolton v. McKinney, 299 Va. 550, 855 S.E.2d 853 (2021). . . . . .9-6; 45-42
Bolton v. Vellines, 26 S.E. 847, 94 Va. 393 (1897). 38-6
Bolyard v. Commonwealth, 11 Va. App. 274, 397 S.E.2d 894 (1990) . . . . . .1-8
Bond v. Crawford, 193 Va. 437, 69 S.E.2d 470 (1952). . . . . .45-104
Bond v. Joyner, 205 Va. 292, 136 S.E.2d 903 (1964). . . . . .10-44
Booker v. Commonwealth, 276 Va. 37, 661 S.E.2d 461 (2008) . . . . . .1-10
Boone v. Standard Acc. Ins. Co., 192 Va. 672, 66 S.E.2d 530 (1951) . . . . . 45-24; 47-28; 47-34; 47-37
Booth v. Robertson, 236 Va. 269, 374 S.E.2d 1 (1988). . . . . .9-32; 15-8
Boots, 274 Va. 513, 649 S.E.2d 695 . . . . . 45-124
Bostic v. About Women OB/GYN, P.C., 275 Va. 567, 659 S.E.2d 290. . . . . .2-16
Bostic v. Whited, 198 Va. 237, 93 S.E.2d 334 (1956). 1-10; 27-12; 27-14
Boston v. De Jarnette, 153 Va. 591, 151 S.E. 146 (1929). . . . . .43-26
Boston v. Shackelford, 162 Va. 733, 175 S.E. 625 (1934). . . . . .45-82
Bott v. N. Snellenburg & Co., 177 Va. 331, 14 S.E.2d 372 (1941). . . . . .45-62
Bott v. Wheeler, 183 Va. 643, 33 S.E.2d 184 (1945). 45-50
Bottoms v. Bottoms, 249 Va. 410, 457 S.E.2d 102 (1995) . . . . . .3-14
Boward v. Leftwich, 197 Va. 227, 89 S.E.2d 32 (1955). . . . . .4-26; 4-31
Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511. . . . . .31-6
Bowers v. Huddleston, 241 Va. 83, 399 S.E.2d 811 (1991). . . . . .48-10
Bowers v. May, 233 Va. 411, 357 S.E.2d 29 (1987). 1-7
Bowers v. Sprouse, 254 Va. 428, 492 S.E.2d 637 (1997). . . . . .9-7
Bowers v. Westvaco Corp., 244 Va. 139, 419 S.E.2d 661 (1992). . . .9-6; 26-3; 26-6; 26-14; 26-18; 33-4; 33-8
Bowie v. Murphy, 271 Va. 126, 624 S.E.2d 74 (2006). . . . . .36-10; 36-28; 36-32; 37-14; 37-33
Bowman v. Commonwealth, 174 Va. 461, 5 S.E.2d 497 (1939). . . . . .1-9
Bowman v. Commonwealth, 290 Va. 492, 777 S.E.2d 851 (2015) . . . . . .39-3
Boyce v. Commonwealth, 279 Va. 644, 691 S.E.2d 782 (2010). . . . . .49-16
Boyd v. Brown, 192 Va. 702, 66 S.E.2d 559 (1951) . 2-14
Boyd v. Cook, 30 Va. 32 (1831). . . . . .48-20
Boykin v. Hermitage Realty, 234 Va. 26, 360 S.E.2d 177 (1987). . . . . .39-10, 39-11; 39-24; 39-28
Braden v. Isabell K. Horsley Real Estate, Ltd., 245 Va. 11, 425 S.E.2d 481 (1993). . . . . .2-20, 2-21
Bradley v. Tolson, 117 Va. 467, 85 S.E. 466. . . . .45-86
Bradner v. Mitchell, 234 Va. 483, 362 S.E.2d 718 (1987). . . . . .9-7; 9-20
Bradshaw v. Minter, 206 Va. 450, 143 S.E.2d 827 (1965) . . . . 23-6; 23-8; 23-10; 23-18; 23-20; 29-10
Bradshaw v. State Highway Comm'r, 210 Va. 66, 168 S.E.2d 129 (1969) . . . . . .46-38
Branch v. Commonwealth, 14 Va. App. 836, 419 S.E.2d 422 (1992) . . . . . .47-72
Brandau v. J.C. Penney Co., 646 F.2d 128. . . . .41-18
Breeding v. Hensley, 258 Va. 207, 519 S.E.2d 369 . 26-2; 26-6; 32-2
Bregel v. Busch Entertainment Corp., 248 Va. 175, 444 S.E.2d 718 (1994). . . . . .22-5
Brewer v. First Nat'l Bank, 202 Va. 807, 120 S.E.2d 273. . . . . .45-5; 45-18
Brickell v. Shawn, 175 Va. 373, 9 S.E.2d 330 (1940). . . . . .44-14

[References are to pages]

Briggs v. Zotos Int'l, Inc., 357 F. Supp. 89 . . . . 34-58
Brinser v. Young, 208 Va. 525, 158 S.E.2d 759 (1968) . . . . . .7-8
Bristol Redev. & Hous. Auth. v. Farmbest, Inc., 215 Va. 106, 205 S.E.2d 406 . . . . . .46-25
Britt v. Commonwealth, 276 Va. 569, 667 S.E.2d 763 (2008) . . . . . 2-28
Broaddus v. Standard Drug Co., 211 Va. 645, 179 S.E.2d 497 (1971) . . . . . 8-30; 36-18; 36-20
Brockett v. Harrell Bros., Inc., 206 Va. 457, 143 S.E.2d 897 (1965) . . . . . .6-4; 34-32; 34-38
Brooks v. Bankson, 248 Va. 197, 445 S.E.2d 473 (1994) . . . . . .45-52; 45-124
Brooks v. Worthington, 206 Va. 352, 143 S.E.2d 841 (1965) . . . . . 2-54
Brooks & Co. Gen. Contrs., Inc. v. Randy Robinson Contr. Inc., 257 Va. 240, 513 S.E.2d 858. . . .45-28
Brown v. Commonwealth, 27 Va. App. 111, 497 S.E.2d 527 (1998) . . . . . .36-20
Brown v. Commonwealth, 278 Va. 523, 685 S.E.2d 43 . . . . . .5-5
Brown v. Hardin, 225 Va. 624, 304 S.E.2d 291 (1983) . . . . . .48-28
Brown v. Huddleston, 213 Va. 146, 191 S.E.2d 234 (1972) . . . . . .9-18
Brown v. Jacobs, 289 Va. 209, 768 S.E.2d 421 (2015) . . . . . .4-6
Brown v. Koulizakis, 229 Va. 524, 331 S.E.2d 440 (1985) . . . . . 35-8; 35-20
Brown v. Peters, 202 Va. 382, 117 S.E.2d 695 (1961) . . . . . .10-64
Brown v. Wright, 216 Va. 10, 216 S.E.2d 13 (1975).10-18
Bruce v. Bibb, 129 Va. 45, 105 S.E. 570. . . . . 42-20
Bruce v. Madden, 208 Va. 636, 160 S.E.2d 137 (1968) . . . . . .9-4
Bruce v. Shuler, 108 Va. 670, 62 S.E. 973 (1908).48-14
Bruce's Ex'X v. Bibb's Ex'X, 129 Va. 45, 105 S.E. 570 (1921) . . . . . .42-20
Brush Arbor Home Constr. v. Alexander, 297 Va. 151, 823 S.E.2d 249 (2019) . . . . . .45-52; 45-96
Bryant v. Bare, 192 Va. 238, 64 S.E.2d 741 (1951).8-20
Bryant v. Commonwealth, 216 Va. 390, 219 S.E.2d 669 (1975) . . . . . 1-7
Bryant v. Cont'l Life Ins. Co., 168 Va. 585, 192 S.E. 581 . . . . . .47-44
Bryant v. Peckinpaugh, 241 Va. 172, 400 S.E.2d 201 . . . . . .39-38
Bryant-Shannon v. Hampton Rds. Cmty. Action Program, Inc., 299 Va. 579, 856 S.E.2d 575 (2021) . . . 37-12
Buchanan v. Doe, 246 Va. 67, 431 S.E.2d 289 (1993) . . . . . .45-12
Buck v. City of Danville, 177 Va. 582, 15 S.E.2d 31 . . . . . 32-6
Budzinski v. Harris, 213 Va. 107, 189 S.E.2d 372 (1972) . . . . . 6-26; 15-12; 15-14
Building, Light & Water Co. v. Fray, 32 S.E. 58, 96 Va. 559 (1899) . . . . . 45-118
Bukva v. Matthews, 149 Va. 500, 140 S.E. 674 (1927) . . . . . .43-26
Bulala v. Boyd, 239 Va. 218, 389 S.E.2d 670 (1990) . 9-4–9-6; 9-9; 33-4; 33-8
Bullard v. Alfonso, 267 Va. 743, 595 S.E.2d 284 (2004) . . . . . 9-5; 9-14, 9-15
Bunn v. Norfolk, F. & D. R. Co., 217 Va. 45, 225 S.E.2d 375 . . . . . .10-41; 18-6; 18-32; 18-38
Burke v. Gale, 193 Va. 130, 67 S.E.2d 917 (1951). .45-60
Burks v. Webb, 199 Va. 296, 99 S.E.2d 629 (1957). .6-16; 9-14
Burnette v. McDonald, 206 Va. 186, 142 S.E.2d 495 (1965) . . . . . .6-8; 6-10
Burns v. Gagnon, 283 Va. 657, 727 S.E.2d 634 . . 4-22; 11-6; 31-6
Burns v. Johnson, 250 Va. 41, 458 S.E.2d 448 (1995) . . . . . 23-14; 25-6
Burroughs v. Keffer, 272 Va. 162, 630 S.E.2d 297 (2006) . . . . . .6-4; 10-8; 10-18
Burruss v. Green Auction & Realty Co., 228 Va. 6, 319 S.E.2d 725 (1984) . . . . . 43-22; 43-24
Burruss v. Hines, 94 Va. 413, 26 S.E. 875 (1897) . 38-3
Burruss Timber Co. v. Frith, 228 Va. 701, 324 S.E.2d 679 (1985) . . . . . .43-5
Burson v. Bristol, 176 Va. 53, 10 S.E.2d 541 (1940).31-4
Burton Lumber Corp. v. Aughenbaugh, 223 Va. 491, 290 S.E.2d 853 (1982) . . . . . .45-46
Busch v. Gaglio, 207 Va. 343, 150 S.E.2d 110 (1966) . . . . . .23-18; 23-20
Bussey v. E.S.C. Restaurants, Inc., 270 Va. 531, 620 S.E.2d 764 . . . . . 34-32
Butler v. Darden, 53 S.E.2d 146, 189 Va. 459 (1949) . . . . . .18-12
Butler v. Frieden, 208 Va. 352, 158 S.E.2d 121 (1967) . . . . . .4-6; 29-6; 29-12
Butler v. S. States Coop., Inc., 270 Va. 459, 620 S.E.2d 768 (2005) . . . . . 33-11
Butler, 189 Va. 459, 53 S.E.2d 146. . . . . .18-12
Butler, 208 Va. 352, 158 S.E.2d 121. . . . . .29-6
B-W Acceptance Corp. v. Benjamin T. Crump Co., 199 Va. 312, 99 S.E.2d 606 (1957). . . . .39-18; 45-106
Byars v. Stone, 186 Va. 518, 42 S.E.2d 847 (1947) . 42-20

[References are to pages]

Byler v. Va. Elec. & Power Co., 284 Va. 501, 731 S.E.2d 916 (2012) . . . . . 46-10; 46-24
Byrd v. Commonwealth, 158 Va. 897, 164 S.E. 400 . 38-11
Byrd v. Life Ins. Co., 219 Va. 824, 252 S.E.2d 307 (1979) . . . . . 47-68

## C

C&C Real Estate, Inc., 272 Va. 2, 630 S.E.2d 505. . 46-16
C.E. Wright & Co., Inc. v. Shackleford, 152 Va. 635, 148 S.E. 807 . . . . . 34-10
C.G. Blake Co. v. W.R. Smith & Son, 147 Va. 960, 133 S.E. 685 . . . . . 45-50
Cady v. Straus, 97 Va. 701, 34 S.E. 615 (1899). . 45-34
Cain v. Lee, 290 Va. 129, 772 S.E.2d 894 (2015). . 1-3; 4-31; 9-34; 9-44; 15-8
Caldwell v. Cline, 109 W. Va. 553, 156 S.E. 55 (1930) . . . . . 45-20
Caldwell v. Commonwealth, 55 Va. 698 (1858). . 45-96
Caldwell v. Tannehill, 117 Va. 11, 84 S.E. 6 (1915) . 43-5
Camp v. Bryant, 171 Va. 390, 199 S.E. 469 (1938) . 10-18
Campbell v. Bettius, 244 Va. 347, 421 S.E.2d 433 (1992) . . . . . 42-8; 42-10
Campbell v. State Highway Comm'r, 209 Va. 509, 165 S.E.2d 281 (1969) . . . . . 46-32
Campbell County v. Howard, 133 Va. 19, 112 S.E. 876 (1922) . . . . . 45-56; 45-132
Campbell Soup Co. v. Davis, 163 Va. 89, 175 S.E. 743 (1934) . . . . . 1-8
Cannon v. Bates, 80 S.E. 581, 115 Va. 711 (1913). . 43-16; 43-18
Canody v. Hamblin, 295 Va. 597, 816 S.E.2d 286 (2018) . . . . . 48-14; 48-18
Canty v. Wyatt Storage Corp., 208 Va. 161, 156 S.E.2d 582 ((1967)) . . . . . 28-16; 28-18; 28-20; 28-22
Canupp v. Wade, 205 Va. 850, 140 S.E.2d 659 (1965) . . . . . 4-12
Caperton v. A.T. Massey Coal Co., 285 Va. 537, 740 S.E.2d 1 (2013) . . . . . 39-6; 39-38
Caplan v. Bogard, 264 Va. 219, 563 S.E.2d 719 (2002) . . . . . 10-88; 10-92; 10-98
Cappo Mgmt. v. V Britt, 282 Va. 33, 711 S.E.2d 209 (2011) . . . . . 45-70
Capps v. Capps, 216 Va. 378, 219 S.E.2d 901 (1975) . . . . . 45-50
Capuano v. Outlet Co., 579 A.2d 469 (R.I. 1990). . 37-6
Cardozo v. Middle Atl. Immig. Co., 116 Va. 342, 82 S.E. 80. . . . . 43-22
Cargo Carriers, Inc. v. Richmond Steel Co., 263 F.2d 919 (4th Cir. 1959) . . . . . 45-20
Carlson v. Wells, 281 Va. 173, 705 S.E.2d 101 (2011) . . . . . 38-3
Carlton v. Boudar, 118 Va. 521, 88 S.E. 174 (1916). 17-2; 17-4
Carlton v. Martin, 160 Va. 149, 168 S.E. 348 (1933) . . . . . 12-12; 12-16
Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962) . . . . . 34-10
Carolina Coach Co. v. Starchia, 219 Va. 135, 244 S.E.2d 788 (1978) . . . . . 7-4
Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644 (1939) . . . . . 8-38
Carroll v. Sneed, 211 Va. 640, 179 S.E.2d 620. . . 9-40, 9-41
Carson v. LeBlanc, 245 Va. 135, 427 S.E.2d 189 (1993) . . . . . 6-14; 14-4; 14-16
Carstensen v. Chrisland Corp., 247 Va. 433, 442 S.E.2d 660 (1994) . . . . . 4-31; 42-4
Carter v. Atlanta & S. A. B. R. Co., 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. 236 (1949) . . . . . 21-3; 21-20
Carter v. Carter, 223 Va. 505, 291 S.E.2d 218 . . 39-30; 39-34
Carter v. Chesterfield County Health Comm'n, 259 Va. 588, 527 S.E.2d 783 (2000) . . . . . 31-1; 31-5
Carter v. Commonwealth, 269 Va. 44, 606 S.E.2d 839 (2005) . . . . . 36-10; 36-28; 36-32
Carter v. Commonwealth, 293 Va. 537, 800 S.E.2d 498 (2017) . . . . . 36-14
Carter v. Commonwealth, 606 S.E.2d 839, 269 Va. 44 (2005) . . . . . 36-10
Carter v. Garner, 204 Va. 153, 129 S.E.2d 671 (1963) . . . . . 10-18
Carter v. Hercules Powder Co., 182 Va. 282, 28 S.E.2d 736 (1944) . . . . . 27-12
Carter v. Hook, 116 Va. 812, 83 S.E.2d 386. . . . 45-34
Carter v. Williams, 246 Va. 53, 431 S.E.2d 297 (1993) . . . . . 39-2
Carver v. Metropolitan Life Ins. Co., 191 Va. 265, 60 S.E.2d 865 (1950) . . . . . 47-72
Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 82 S.E.2d 588 . . . . . 37-15; 37-30
Casale, 247 Va. 180, 441 S.E.2d 212. . . . . 21-24
Cashion v. Smith, 286 Va. 327, 749 S.E.2d 526 (2013) . . . . . 37-11, 37-12; 37-32, 37-33
Cassady v. Martin, 220 Va. 1093, 266 S.E.2d 104 (1980) . . . . . 9-40
Castle v. Lester, 272 Va. 591, 636 S.E.2d 342 (2006). 1-7; 1-9
CaterCorp, Inc. v. Catering Concepts, Inc., 431 S.E.2d 277, 246 Va. 22, 1993-1 Trade Cas. (CCH) P70286 (1993) . . . . . 40-16, 40-17; 40-20
Caudill v. County of Dinwiddie, 259 Va. 785, 529 S.E.2d 313 (2000) . . . . . 45-10

[References are to pages]

Caudill v. Gibson Fuel Co., 185 Va. 233, 38 S.E.2d 465 (1946) . . . . . 24-6
Centra Health, Inc. v. Mullins, 277 Va. 59, 670 S.E.2d 708 (2009) . . . . . 9-9; 9-41, 9-42
Central Nat'l Bank v. First & Merchants Nat'l Bank, 171 Va. 289, 198 S.E. 883 . . . . . 45-113
Century-21 v. Elder, 239 Va. 637, 391 S.E.2d 296 . 40-6; 40-8
Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 . . . . . 9-9
CGI Fed. Inc. v. FCi Fed., Inc., 295 Va. 506, 814 S.E.2d 183 (2018) . . . . . 45-107
Cha v. Korean Presbyterian Church, 262 Va. 604, 553 S.E.2d 511 (2001) . . . . . 37-14
Chacey v. Garvey, 291 Va. 1, 781 S.E.2d 357 (2015) . . . . . 27-3; 27-14
Chaffin v. Lynch, 83 Va. 106, 1 S.E. 803 (1887) . 37-30
Chain v. Wilhelm, 84 F.2d 138 (4th Cir. 1936) . . 45-20; 45-34
Chairman, Hwy. Comm'n v. Fletcher, 153 Va. 43, 149 S.E. 456 . . . . . 46-24
Chalkley v. Atlantic C. L. R. Co., 150 Va. 301, 143 S.E. 631 . . . . . 37-32
Chalkley v. City of Richmond, 88 Va. 402, 14 S.E. 339 (1891) . . . . . 31-2
Chandler v. Graffeo, 268 Va. 673, 604 S.E.2d 1 (2004) . . . . . 35-3; 35-42
Chandler v. Russell, 164 Va. 318, 180 S.E. 313 (1935) . . . . . 39-18
Chandler v. Satchell, 160 Va. 160, 168 S.E. 744 . 39-18; 39-40
Chang v. First Colonial Sav. Bank, 242 Va. 388, 410 S.E.2d 928 (1991) . . . . 45-14; 45-16; 45-26; 45-34
Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) . . . . . 37-7
Chapman v. City of Virginia Beach, 252 Va. 186, 475 S.E.2d 798 . . . . . 4-22; 6-2; 6-4; 9-46; 26-2; 31-3
Chappell v. Trent, 90 Va. 849, 19 S.E. 314 (1893) . 48-21
Chappell v. Virginia Elec. & Power Co., 250 Va. 169, 458 S.E.2d 282 (1995) . . . . . 46-8; 46-10; 46-24, 46-25
Charles E. Brauer Co. v. NationsBank of Virginia, N.A., 466 S.E.2d 382, 251 Va. 28 (1996) . . . 40-16, 40-17; 40-20
Charles E. Russell Co. v. Carroll, 194 Va. 699, 74 S.E.2d 685 (1953) . . . . . 45-70
Charlton v. Craddock-Terry Shoe Corp., 235 Va. 485, 369 S.E.2d 175 (1988) . . . . . 2-20
Chase v. DaimlerChrysler Corp., 266 Va. 544, 587 S.E.2d 521 (2003) . . . . . 34-64
Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985) . . . . 37-13; 37-27; 40-2; 40-6; 40-8; 40-10
Chavez v. Continental Ins. Co., 218 Va. 76, 235 S.E.2d 335 (1977) . . . . . 47-72
Chawla v. BurgerBusters, Inc., 255 Va. 616, 499 S.E.2d 829 (1998) . . . . . 42-20
Cherry v. Lawson Realty Corp., 295 Va. 369, 812 S.E.2d 775 (2018) . . . . . 24-6
Chesapeake & Ohio Ry. Co. v. Crum, 140 Va. 333, 125 S.E. 301 . . . . . 18-16
Chesapeake & Ohio R. R. Co. v. Arrington, 126 Va. 194, 101 S.E. 415 (1919) . . . . . 21-16
Chesapeake & Ohio R. R. Co. v. Butler, 163 Va. 626, 177 S.E. 195 (1934) . . . . . 21-6
Chesapeake & Ohio R.R. Co. v. Corbin's Adm'r, 110 Va. 700, 67 S.E. 179 . . . . . 23-6
Chesapeake & Ohio R. R. Co. v. Crum, 125 S.E. 301, 140 Va. 333 (1924) . . . . . 18-16
Chesapeake & Ohio R.R. Co. v. Jacobs, 166 Va. 11, 183 S.E. 221 . . . . . 18-34
Chesapeake & Ohio R. R. Co. v. Meadows, 119 Va. 33, 89 S.E. 244 (1916) . . . . . 21-18
Chesapeake & Ohio R. R. Co. v. Meyer, 150 Va. 656, 143 S.E. 478 (1928) . . . . . 18-12; 18-38
Chesapeake & Ohio R.R. Co. v. Mosby, 93 Va. 93, 24 S.E. 916 . . . . . 45-44
Chesapeake & Ohio Ry. Co. v. F. W. Stock & Sons, 104 Va. 97, 51 S.E. 161 . . . . . 1-11
Chesapeake & Ohio Ry. Co. v. Faison, 189 Va. 341, 52 S.E.2d 865 . . . . . 18-4
Chesapeake & Ohio Ry. Co. v. Greaver, 110 Va. 350, 66 S.E. 59 (1909) . . . . . 26-18
Chesapeake & Ohio Ry. Co. v. Hanes, 196 Va. 806, 86 S.E.2d 122 . . . . . 2-38
Chesapeake & Ohio Ry. Co. v. Pulliam, 185 Va. 908, 41 S.E.2d 54 (1947) . . . . . 18-3; 18-26
Chesapeake & Ohio Ry. v. Greaver, 110 Va. 350, 66 S.E. 59 . . . . . 26-18
Chesapeake & Ohio Ry. v. Pulliam, 185 Va. 908, 41 S.E.2d 54 . . . . . 18-3; 18-26
Chesapeake & Potomac Tel. Co. of Va. v. Properties One, Inc., 247 Va. 136, 439 S.E.2d 369 (1994) . . . 8-30
Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc., 234 Va. 492, 362 S.E.2d 723 (1987) . . . . . 45-120
Chesapeake & Potomac Tel. Co. v. Wythe Mut. Tel. Co., 142 Va. 529, 129 S.E. 389 . . . . . 45-74
Chesapeake & Potomac Tel. v. Sisson & Ryan, Inc., 234 Va. 492, 362 S.E.2d 723 . . . . . 45-120
Chesapeake Ferry Co. v. Commings, 158 Va. 33, 164 S.E. 281 (1932) . . . . . 22-4
Chick Transit Corp. v. Edenton, 170 Va. 361, 196 S.E. 648 (1938) . . . . . 9-41; 10-28; 10-56
Chipouras v. A.J. & L. Corp., 223 Va. 511, 290 S.E.2d 859 . . . . . 41-20

[References are to pages]

Chittum v. Potter, 216 Va. 463, 219 S.E.2d 859 (1975). . . . . 45-32
Chitwood v. Prudential Ins. Co., 206 Va. 314, 143 S.E.2d 915 (1965) . . . . . 47-60
Chodorov v. Eley, 239 Va. 528, 391 S.E.2d 68 (1990). . . . . 7-4
Chosar Corp. v. Owens, 235 Va. 660, 370 S.E.2d 305, 101 O.&G.R. 393 (1988). . . . . 24-22
Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986). . . . . 2-38, 2-39
Christy v. Atchison, T. & S. F. R. Co., 233 F. 255 (8th Cir. 1916). . . . . 44-2
Church of Scientology v. Cazares, 455 F. Supp. 420 (M.D. Fla. 1978) . . . . . 37-3
Cilumbrello, 204 Va. 11, 129 S.E.2d 31 . . . . . 32-14
Citizens' Bank v. Taylor & Co., 104 Va. 164, 51 S.E. 159 . . . . . 45-74
Citizens Home Ins. Co. v. Nelson, 218 Va. 216, 237 S.E.2d 100 (1977) . . . . . 47-68
Citizens Rapid Transit Co. v. O'Hara, 203 Va. 979, 128 S.E.2d 270 (1962). . . . . 6-24; 10-16
City of Alexandria v. J-W Enters., Inc., 279 Va. 711, 691 S.E.2d 769 (2010) . . . . . 8-28; 31-6
City of Chesapeake v. Cunningham, 268 Va. 624, 604 S.E.2d 420 (2004). . . . . 31-2
City of Danville v. Howard, 156 Va. 32, 157 S.E. 733. . . . . 9-46
City of Lynchburg, 270 Va. 166, 613 S.E.2d 407 . 4-22; 31-3
City of Newport News v. Anderson, 216 Va. 791, 223 S.E.2d 869 . . . . . 32-14
City of Norfolk v. Anthony, 117 Va. 777, 86 S.E. 68 (1915) . . . . . 31-4
City of Norfolk v. Bennett, 205 Va. 877, 140 S.E.2d 655 . . . . . 39-10
City of Norfolk v. Hall, 175 Va. 545, 9 S.E.2d 356 . 32-14
City of Norfolk v. Norfolk County, 120 Va. 356, 91 S.E. 820 . . . . . 45-54
City of Norfolk v. Travis, 149 Va. 523, 140 S.E. 641 (1927). . . . . 32-2; 32-6
City of Petersburg v. Applegarth, 69 Va. 321 . . . . 31-4
City of Portsmouth v. Cilumbrello, 204 Va. 11, 129 S.E.2d 31 . . . . . 32-2; 32-14
City of Portsmouth v. Madrey, 168 Va. 517, 191 S.E. 595 (1937) . . . . . 31-4
City of Richmond v. Atlantic Co., 273 F.2d 902 . . 30-8
City of Richmond v. Barry, 109 Va. 274, 63 S.E. 1074 . . . . . 45-78
City of Richmond v. Branch, 205 Va. 424, 137 S.E.2d 882 (1964) . . . . . 8-30; 32-6; 32-10
City of Richmond v. Cheatwood, 130 Va. 76, 107 S.E. 830 (1921) . . . . . 31-2; 45-128
City of Richmond v. Gay, 103 Va. 320, 49 S.E. 482 . 5-10
City of Richmond v. Grizzard, 205 Va. 298, 136 S.E.2d 827 ((1964)) . . . . . 23-10; 31-4
City of Richmond v. Holt, 264 Va. 101, 563 S.E.2d 690 (2002) . . . . . 31-4; 32-6; 32-16; 32-18
City of Richmond v. Hood Rubber Products Co., 168 Va. 11, 190 S.E. 95 (1937) . . . . . 31-2
City of Richmond v. Jackson, 118 Va. 674, 88 S.E. 49 (1916) . . . . . 8-30
City of Richmond v. Old Dominion Iron Corp., 212 Va. 611, 186 S.E.2d 30. . . . . 46-25
City of Richmond v. Pemberton, 108 Va. 220, 61 S.E. 787 (1908) . . . . . 32-6
City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927). . . . . 31-2; 32-3
City of Richmond v. Williams, 114 Va. 698, 77 S.E. 492 . . . . . 46-25
City of Richmond v. Wood, 109 Va. 75, 63 S.E. 449 (1909) . . . . . 31-2
City of South Norfolk v. Dail, 187 Va. 495, 47 S.E.2d 405. . . . . 32-2
City of Staunton v. Aldhizer, 211 Va. 658, 179 S.E.2d 485 . . . . . 46-24
City of Suffolk v. Hewitt, 226 Va. 20, 307 S.E.2d 444 . . . . . 23-12; 23-14; 23-28
City of Va. Beach v. Oakes, 263 Va. 510, 561 S.E.2d 726 (2002). . . . . 46-10; 46-20; 46-24; 46-38
City of Virginia Beach v. Carmichael Dev. Co., 259 Va. 493, 527 S.E.2d 778 (2000) . . . . . 31-1, 31-2; 31-5
City of Virginia Beach v. Flippen, 251 Va. 358, 467 S.E.2d 471 (1996). . . . . 31-3
City of Virginia Beach v. Murphy, 239 Va. 353, 389 S.E.2d 462. . . . . 26-6
City of Virginia Beach v. Oaks, 263 Va. 510, 561 S.E.2d 726 . . . . . 46-10; 46-38
City of Virginia Beach v. Roman, 201 Va. 879, 114 S.E.2d 749. . . . . 31-4; 32-16
Clark v. Chapman, 238 Va. 655, 385 S.E.2d 885 (1989). . . . . 9-5
Clark v. Commonwealth, 279 Va. 636, 691 S.E.2d 786 (2010). . . . . 36-10; 36-28; 36-32
Clark v. Hugo, 130 Va. 99, 107 S.E. 730 (1921) . 48-18
Clark v. Parker, 161 Va. 480, 171 S.E. 600 (1933). 10-18
Clark v. Scott, 258 Va. 296, 520 S.E.2d 366 . . . 45-116
Clausen v. Virginia Transit Co., 211 Va. 557, 179 S.E.2d 463 (1971) . . . . . 10-70
Clawson v. Longview Pub. Co., 589 P.2d 1223, 91 Wn.2d 408 (Wash. 1979) . . . . . 37-3
Clay v. Butler, 112 S.E. 697, 132 Va. 464 (1922) . 39-10
Clayton v. Taylor, 193 Va. 555, 69 S.E.2d 424 (1952) . . . . . 2-20

[References are to pages]

Clevert v. Jeff W. Soden, Inc., 241 Va. 108, 400 S.E.2d 181 (1991) . . . . . 35-50; 45-52; 45-66

Clifton v. Gregory, 212 Va. 859, 188 S.E.2d 203 (1972). . . . . .10-12

Clinchfield Coal Corp. v. Hayter, 108 S.E. 854, 130 Va. 711 (1921) . . . . . 45-128

Clinchfield Coal Corp. v. Redd, 123 Va. 420, 96 S.E. 836 (1918) . . . . . 41-8; 41-10

Cline v. Dunlora South, LLC, 284 Va. 102, 726 S.E.2d 14 . . . . . 26-6

Clohessy v. Weiler, 250 Va. 249, 462 S.E.2d 94 (1995) . . . . . 14-8

Clover Creamery Co. v. Kanode, 142 Va. 542, 129 S.E. 222 (1925). . . . . .8-24

Cloyd v. Press, Inc., 629 S.W.2d 24 (Tenn. App. 1981). . . . . .37-6

CNX Gas Co. v. Rasnake, 287 Va. 163, 752 S.E.2d 865, 180 O.&G.R. 661 . . . . . 45-52; 45-62

Coalson v. Canchola, 287 Va. 242, 754 S.E.2d 525 (2014). . . . . .9-32; 9-34

Cobert v. Home Owners Warranty Corp., 239 Va. 460, 391 S.E.2d 263 (1990). . . . . .45-10

Cochran v. Bise, 197 Va. 483, 90 S.E.2d 178 (1955). . . . . .45-60

Cofield v. Nuckles, 239 Va. 186, 387 S.E.2d 493 (1990) . . . . . 6-26; 14-4; 14-10; 14-16

Cohn v. Knowledge Connections, Inc., 266 Va. 362, 585 S.E.2d 578 . . . . . .39-6; 39-38; 39-40; 39-42

Coker v. Gunter, 191 Va. 747, 63 S.E.2d 15 (1951). .8-26

Colby v. Boyden, 241 Va. 125, 400 S.E.2d 184 (1991). .4-22; 11-2; 11-6, 11-7; 11-10; 11-12; 11-14; 31-5

Cole v. Norfolk S. Ry. Co., 294 Va. 92, 803 S.E.2d 346 (2017). . . . . .21-2, 21-3

Coleman v. Blankenship Oil Corp., 221 Va. 124, 267 S.E.2d 143 (1980) . . . . . 5-4; 5-8; 5-10, 5-11

Coleman Furniture Corp. v. Home Ins. Co., 4 F. Supp. 794 (W.D. Va. 1933). . . . . .47-44

Coleman Furniture Corp. v. Home Ins. Co., 67 F.2d 347 (4th Cir. 1933). . . . . .47-44

Colgin v. Henley, 33 Va. 85 (1835) . . . . . 45-42

Coliniatis v. Dimas, 965 F. Supp. 511 (S.D.N.Y. 1997). . . . . .37-3

Collelo v. Geographic Servs., 283 Va. 56, 727 S.E.2d 55 (2012). . . . . .40-6; 40-8

Collett v. Cordovana, 290 Va. 139, 772 S.E.2d 584 (2015) . . . . . 4-6; 26-6; 27-6

Collins v. Smith, 198 Va. 778, 96 S.E.2d 818 (1957). 1-10

Colonial Natural Gas Co. v. Sayers, 222 Va. 781, 284 S.E.2d 599 (1981) . . . . . 23-10; 24-11

Colonial Pipeline Co. v. Lohman, 207 Va. 775, 152 S.E.2d 34 (1967) . . 1-12; 46-4; 46-20; 46-24; 46-36

Colonial Stores, Inc. v. Pulley, 203 Va. 535, 125 S.E.2d 188 (1962) . . . . . .23-16

Columbia Fire Ins. Co. v. Boykin & Tayloe, Inc., 185 F.2d 771 (4th Cir. 1950). . . . . .47-44

Combs v. Dickenson-Wise Medical Group, 233 Va. 177, 355 S.E.2d 553 (1987). . . . . .45-52

Comess v. Norfolk General Hospital, Inc., 189 Va. 229, 52 S.E.2d 125 (1949) . . . . . 23-12

Comm'r of Hwys v. Karverly, Inc., 295 Va. 380, 813 S.E.2d 322 (2018) . . . . . .46-36

Commercial Bus. Sys. v. Bellsouth Servs., 249 Va. 39, 453 S.E.2d 261 . . . . . 45-110; 45-116

Commercial Bus. Sys. v. Halifax Corp., 253 Va. 292, 484 S.E.2d 892 (1997) . . . . .40-2; 40-10, 40-11; 40-14

Commercial Bus. Sys., Inc. v. Bellsouth Servs., Inc., 249 Va. 39, 453 S.E.2d 261.8-10; 8-14; 8-16; 8-22; 40-2; 40-16; 40-20; 45-110; 45-112; 45-116

Commercial Distribs., Inc. v. Blankenship, 240 Va. 382, 397 S.E.2d 840 . . . . . 2-30; 5-4; 35-2

Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 540 S.E.2d 491 (2001) . . . . .47-60

Commissary Concepts Mgmt. Corp. v. Mziguir, 267 Va. 586, 594 S.E.2d 915 . 41-2; 41-10; 41-14; 41-16; 41-24

Commonwealth v. Alexander, 260 Va. 238, 531 S.E.2d 567 (2000) . . . . . .36-14

Commonwealth v. Allen, 269 Va. 262, 609 S.E.2d 4 (2005) . . . . . .49-6; 49-16

Commonwealth v. Coolidge, 237 Va. 621, 379 S.E.2d 338 (1989). . . . . .3-4

Commonwealth v. Hill, 264 Va. 541, 570 S.E.2d 805 . . . . . .36-20

Commonwealth v. Hudson, 265 Va. 505, 578 S.E.2d 781 (2003) . . . . . .2-28

Commonwealth v. Miller, 273 Va. 540, 643 S.E.2d 208 (2007). . . . . .49-2, 49-3; 49-6; 49-8; 49-14; 49-16

Commonwealth v. Millsaps, 232 Va. 502, 352 S.E.2d 311 (1987). . . . . .1-10; 6-27; 7-12

Commonwealth v. Peterson, 286 Va. 349, 749 S.E.2d 307 (2013). . . . . .4-6; 23-14

Commonwealth v. Proffitt, 292 Va. 626, 792 S.E.2d 3 (2016). . . . . .49-6; 49-8; 49-16

Commonwealth v. Squire, 278 Va. 746, 685 S.E.2d 631 (2009) . . . . . 49-8; 49-14

Commonwealth, Dep't of Mental Health & Mental Retardation v. Sheriff of Nottoway County, 221 Va. 306, 269 S.E.2d 815. . . . . .44-3

Commonwealth, DOT v. Fairbrook Business Park Assoc., 244 Va. 99, 418 S.E.2d 874 (1992). . . . . .46-20

[References are to pages]

Commonwealth Transp. Comm'r v. Du Val, 238 Va. 679, 385 S.E.2d 605 (1989) . . . . . 46-8; 46-21
Commonwealth Transp. Comm'r v. Glass, 270 Va. 138, 613 S.E.2d 411 (2005) . . . . . 46-3; 46-24; 46-36
Commonwealth Transp. Comm'r v. Thompson, 249 Va. 292, 455 S.E.2d 206 (1995). . . . . .46-24
Commonwealth Transp. Comm'r of Va. v. Glass, 270 Va. 138, 613 S.E.2d 411. . . . . .46-3
Community Bank v. Wright, 221 Va. 172, 267 S.E.2d 158 (1980) . . . . . .39-6
Community Bus Co. v. Windley, 224 Va. 687, 299 S.E.2d 367. . . . . .6-20
Comptroller of Va. ex rel. VMI v. King, 217 Va. 751, 232 S.E.2d 895 . . . . . .35-48
Condominium Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condominium, Inc., 281 Va. 561, 709 S.E.2d 163 (2011). . . . . .9-12
CONRAIL v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427, 16 O.S.H. Cas. (BNA) 1904 (1994). . . . . .21-2
Continental Casualty Co. v. Town of Blacksburg, 846 F. Supp. 483 (W.D. Va. 1993). . . . . .31-2
Continental Ins. Co. v. Kasey, 66 Va. 268 (1874) . 47-12
Cook v. Basnight, 207 Va. 491, 151 S.E.2d 408 (1966). . . . . .2-14; 4-12
Cook v. Hayden, 31 S.E.2d 625, 183 Va. 203 (1944). . . . . .39-30; 39-34
Cooper v. Commonwealth, 2 Va. App. 497, 345 S.E.2d 775 (1986). . . . . .1-2; 1-7
Cooper v. Commonwealth, 277 Va. 377, 673 S.E.2d 185 (2009) . . . . . .1-10
Cooper v. Cooper, 249 Va. 511, 457 S.E.2d 88 (1995) . . . . . .2-54
Cooper v. Horn, 248 Va. 417, 448 S.E.2d 403 (1994). 7-24; 27-6
Cooper v. Knox, 197 Va. 602, 90 S.E.2d 844 (1956) . 8-40
Cooper v. Melendez, 260 Va. 578, 537 S.E.2d 580 . 34-36
Cooper v. Pickett, 202 Va. 65, 116 S.E.2d 52 ((1960)). . . . . .10-48
Cooper v. Whiting Oil Co., 226 Va. 491, 311 S.E.2d 757 (1984) . . . . . .9-12
Cooper Indus., Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580 (2000) . . . . . .5-4; 34-36
Copenhaver v. Rogers, 238 Va. 361, 384 S.E.2d 593 (1989) . . . . . .34-2; 45-10
Corbett v. Clarke, 187 Va. 222, 46 S.E.2d 327 (1948) . . . . . .9-22
Costello v. Larsen, 29 S.E.2d 856, 182 Va. 567 (1944). . . . . .39-24
Coston v. Bio-Med. Applications of Va., Inc., 275 Va. 1, 654 S.E.2d 560. . . . . .35-22
Country Vintner, Inc. v. Louis Latour, Inc., 272 Va. 402, 634 S.E.2d 745 (2006). . . . . .40-17
Countryside Orthopaedics, P.C. v. Peyton, 261 Va. 142, 541 S.E.2d 279 (2001). . . . . .45-62; 45-82, 45-83
County Sch. Bd. v. Thomas, 201 Va. 608, 112 S.E.2d 877 (1960). . . . .12-2; 12-6; 12-8; 12-10; 12-12; 12-14
Couplin v. Payne, 270 Va. 129, 613 S.E.2d 592 (2005). . . . . .4-22; 11-2; 31-6
Coutlakis v. CSX, 293 Va. 212, 796 S.E.2d 556. . 7-16; 7-20
Cowan v. Hospice Support Care, Inc., 268 Va. 482, 603 S.E.2d 916 (2004). . . .4-22; 4-30; 9-41; 11-6, 11-7
Cowles v. Zahn, 206 Va. 743, 146 S.E.2d 200 (1966).7-5
Cox v. Mabe, 214 Va. 705, 204 S.E.2d 253 (1974) . 1-8; 5-10; 10-104
Craig v. Dye, 259 Va. 533, 526 S.E.2d 9 (2000) . 47-57
Crandall v. Woodard, 206 Va. 321, 143 S.E.2d 923 ((1965)) . . . . . .28-4
Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992). . . . . .37-3
Crawford v. Heatwole, 66 S.E. 46, 110 Va. 358 (1909). . . . . .45-124
Crawford v. United Steelworkers, 230 Va. 217, 335 S.E.2d 828, 120 LRRM 3142 (1985). . 37-14; 37-30
Crawford, 110 Va. 358, 66 S.E. 46. . . . . .45-124
Crawford & Co. v. Graves, 199 Va. 495, 100 S.E.2d 714 . . . . . .37-32
Creasy v. Henderson, 173 S.E.2d 823, 210 Va. 744 (1970). . . . . .39-34
Creech v. Mass. Bonding & Ins. Co., 160 Va. 567, 169 S.E. 545 . . . . . 47-10
Crew v. Nelson, 188 Va. 108, 49 S.E.2d 326 (1948) . 2-20
Crewe v. Marler, 319 S.E.2d 748, 228 Va. 109 (1984) . . . . . .32-2
Crews v. Sullivan, 133 Va. 478, 113 S.E. 865 (1922). . . . . .45-22; 45-32; 45-34
Crist v. Washington, Va. & Md. Coach Co., 196 Va. 642, 85 S.E.2d 213 . . . . . .10-26; 22-4
Cromartie v. Billings, 298 Va. 284, 837 S.E.2d 247 (2020) . 31-5, 31-6; 36-18; 36-20; 38-2; 38-6; 38-10; 38-24; 38-26; 38-28
Crosby v. Buchanan, 90 U.S. 420, 23 L. Ed. 137 (1874). . . . . .39-10
Cross v. Ledford, 120 N.E.2d 118, 161 Ohio St. 469, 53 Ohio Op. 361, 3 O.&G.R. 1334 (Ohio 1954) . . 49-8
Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471 (1924). . . . . .36-6; 36-18; 38-2; 38-8
Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513. . . . . .34-30

[References are to pages]

Crouse v. Pugh, 188 Va. 156, 49 S.E.2d 421 (1948). 10-18
Crowder v. Commonwealth, 191 S.E.2d 239, 213 Va. 151 (1972). . . . . .38-10
Crowder v. Gen. Acc., Fire & Life Assur. Corp., Ltd., 180 Va. 117, 21 S.E.2d 772 . . . . . 47-94
CSX Transp. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993) . 18-3; 18-36; 18-40
CSX Transp. v. McBride, 564 U.S. 685, 131 S. Ct. 2630, 180 L. Ed. 2d 637. . . . . .21-2
CSX Transp., Inc. v. Casale, 247 Va. 180, 441 S.E.2d 212 (1994). . . . . .21-24
CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 . . . 18-3; 18-36; 18-40
CSX Transp., Inc. v. McBride, 564 U.S. 685, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011). . 21-2; 21-6; 21-10
Culberson v. McCloud, 227 Va. 249, 315 S.E.2d 219 (1984). . . . . .7-4; 10-32; 17-12
Culpeper Nat'l Bank v. Tidewater Improv. Co., 119 Va. 73, 89 S.E. 118 (1916). . . . . .45-113
Culpepper v. Neff, 204 Va. 800, 134 S.E.2d 315 (1964). . . . . .2-26
Culpepper v. Robie, 155 Va. 64, 154 S.E. 687 (1930). . . . . .48-34
Curtis v. Highfill, 298 Va. 499, 840 S.E.2d 321 (2020). . . . . .4-30; 9-44
Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). 37-8; 37-10; 37-19; 37-22; 37-48
Cushman v. Fitz-Hugh, 199 Va. 234, 98 S.E.2d 706 (1957). . . . . .45-42

## D

D.C. McClain, Inc. v. Arlington Cnty., 249 Va. 131, 452 S.E.2d 659 (1995). . . . . .9-12
Dabney v. Augusta Mut. Ins. Co., 282 Va. 78, 710 S.E.2d 726 (2011). . . . . 47-56
Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 (1963). . . . . 9-33
Damage to Residue. State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 257 S.E.2d 832 (1979). 46-38
Damron v. Hagy, 220 Va. 455, 258 S.E.2d 517 (1979). . . . . .10-80
Danburg v. Keil, 235 Va. 71, 365 S.E.2d 754 (1988). . . . . .45-120
Daniels v. C. I. Whitten Transfer Co., 196 Va. 537, 84 S.E.2d 528 (1954) . . . . . 7-2; 7-4, 7-5
Danville v. Howard, 156 Va. 32, 157 S.E.2d 733 (1931). . . . . 9-46
Danville Community Hosp. v. Thompson, 186 Va. 746, 43 S.E.2d 882 (1947). . . . . 7-24; 35-22; 35-46
Darden v. North American Ben. Ass'n, 170 Va. 479, 197 S.E. 413 (1938) . . . . . 47-29
Darnell v. Commonwealth, 6 Va. App. 485, 370 S.E.2d 717 (1988) . . . . . 1-9
Darnell v. Davis, 190 Va. 701, 58 S.E.2d 68 (1950). 37-12
Daugherty v. Diment, 238 Va. 520, 385 S.E.2d 572 (1989). . . . . .45-62
Daugherty v. Hippchen, 7 S.E.2d 119, 175 Va. 62 (1940) . . . . . 23-22; 30-4
Daughtrey v. Ashe, 243 Va. 73, 413 S.E.2d 336 (1992). . . . . .34-10; 34-14
Davidson v. Allam, 143 Va. 367, 130 S.E. 245 (1925). . . . . .36-18
Davidson v. Jackson, 193 Va. 330, 68 S.E.2d 524 (1952). . . . . .10-44
Davis v. Anderson, 99 Va. 620, 39 S.E. 588. . . . .45-40
Davis v. Marshall Homes, 265 Va. 159, 576 S.E.2d 504. . . . . .39-2; 39-6; 39-30; 45-106
Davis v. Merrill, 133 Va. 69, 112 S.E. 628 (1922). 8-16; 8-22
Davis v. Virginian R. Co., 361 U.S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366 (1960) . . . . . .21-4
Davis, 133 Va. 69, 112 S.E. 628. . . . . .8-16
Davis, 361 U.S. 354, 80 S. Ct. 387, 4 L. Ed. 2d 366. . . . . .21-4
Davoudlarian v. Krombein, 244 Va. 88, 418 S.E.2d 868 (1992). . . . . .9-7
Dawson v. Fusco's Auto Serv., 178 Va. 350, 17 S.E.2d 364. . . . . .4-22; 28-10
Dawson v. Hotchkiss, 160 Va. 577, 169 S.E. 564 (1933). . . . . .42-14; 42-18
De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 . . . . . 37-3
Dean v. Bd. of County Supervisors, 281 Va. 536, 708 S.E.2d 830. . . . . .46-18
Dean v. Morris, 287 Va. 531, 756 S.E.2d 430 (2014). . . . . .45-46
Deans v. CSX Transp., Inc., 216 F.3d 398 (4th Cir. 2000). . . . . .21-3; 21-20
DeChene v. Smallwood, 226 Va. 475, 311 S.E.2d 749. . . . . .38-2; 38-8; 38-11; 38-24
Decker v. Harlan, 260 Va. 66, 531 S.E.2d 309 (2000) . . . . . 31-3
DeJarnette v. Thomas M. Brooks Lumber Co., 97 S.E.2d 750, 199 Va. 18 (1957) . . . . . 39-16
Delacruz v. Commonwealth, 11 Va. App. 335, 398 S.E.2d 103 (1990). . . . . .1-2; 1-7
Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 523 S.E.2d 826 (2000). 4-6; 33-4; 33-8; 33-10; 33-14
Dellastatious v. Boyce, 147 S.E. 267, 152 Va. 368 (1929) . . . . . 38-3
Delly v. Seaboard Citizens Nat'l Bank, 202 Va. 764, 120 S.E.2d 457 . . . . . .48-32

[References are to pages]

Demby v. English, 667 So. 2d 350 (Fla. Dist. Ct. App. 1995). . . . . .37-3
DeMille v. Commonwealth, 283 Va. 316, 720 S.E.2d 69 (2012) . . . . . .49-8; 49-14; 49-16
Denby v. Davis, 212 Va. 836, 188 S.E.2d 226 (1972).7-10
Denton v. Browntown Valley Assocs., 294 Va. 76, 803 S.E.2d 490 (2017) . . . . . .42-20
DePriest v. Pearson, 239 Va. 134, 387 S.E.2d 480 (1990) . . . . . .31-3
Desetti v. Chester, 290 Va. 50, 772 S.E.2d 907 (2015) . . . . . .42-8
Detroit Edison Co. v. Wyatt Coal Co., 1 F.2d 788. .45-124
DeWald v. King, 233 Va. 140, 354 S.E.2d 60 (1987). 9-7
Dey v. Virginia Transit Co., 187 Va. 635, 47 S.E.2d 552 (1948). . . . . .10-62
Dickenson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967) . . . . . .4-16; 4-20
Dickerson v. Conklin, 218 Va. 59, 235 S.E.2d 450 (1977). . . . . .45-54; 47-28; 47-32
Dickerson v. Fatehi, 253 Va. 324, 484 S.E.2d 880 (1997). . . . . .35-22
Diehl v. Butts, 255 Va. 482, 499 S.E.2d 833 (1998). .2-54
Diggs v. Lail, 201 Va. 871, 114 S.E.2d 743 (1960). .2-10; 9-12; 13-4
Dill v. Kroger Ltd. P'ship, 300 Va. 99, 860 S.E.2d 372. . . . . .38-6; 38-10; 41-6; 41-10; 41-14
Dillard v. Collins, 66 Va. 343. . . . . .45-40
Dixon v. Hassell & Folkes, P.C., 283 Va. 456, 723 S.E.2d 383 (2012) . . . . . .45-26
Dixon v. Sublett, 295 Va. 60, 809 S.E.2d 617 (2018). . . . . .35-20; 35-22
Dockery v. City of Norton, 204 Va. 752, 133 S.E.2d 296 (1963) . . . . . .32-6
Doctors Co. v. Women's Healthcare Assocs., 285 Va. 566, 740 S.E.2d 523. . . . . .45-70; 47-29
Doe v. Baker, 299 Va. 628, 857 S.E.2d 573 (2021). .4-22; 4-26; 4-30; 8-8; 8-14; 33-2; 33-4; 33-8; 33-10; 33-14
Doe v. Dewhirst, 240 Va. 266, 396 S.E.2d 840 (1990) . . . . . .6-12; 13-6
Doe v. Faulkner, 203 Va. 522, 125 S.E.2d 169 (1962) . . . . . .2-54
Doe v. Houser, 213 Va. 617, 194 S.E.2d 754 (1973) . 2-52
Doe v. Isaacs, 265 Va. 531, 579 S.E.2d 174 (2003). .4-30; 9-32; 9-34; 15-8
Doe v. Scott, 221 Va. 997, 277 S.E.2d 159 (1981). .10-74; 14-4
Doe v. Simmers, 154 S.E.2d 146, 207 Va. 956 (1967) . . . . . .16-6; 16-8
Doe v. Terry, 273 Va. 3, 639 S.E.2d 197 . . .4-10; 4-12
Doe v. Zwelling, 270 Va. 594, 620 S.E.2d 750 (2005). . . . . .33-11
Doherty v. Aleck, 273 Va. 421, 641 S.E.2d 93 (2007).5-8
Dominion Res., Inc. v. Alstom Power, Inc., 297 Va. 262, 825 S.E.2d 752 (2019) . . . . . 9-2; 9-14, 9-15
Donohoe Constr. Co. v. Mt. Vernon Associates, 235 Va. 531, 369 S.E.2d 857 (1988). . . . . .37-12; 41-6
Dorman v. State Indus., 292 Va. 111, 787 S.E.2d 132 (2016). . . . . .4-7; 5-4; 5-10
Doss v. Rader, 187 Va. 231, 46 S.E.2d 434 (1948). .10-18; 10-104; 10-108
Doswell v. Thompson, 143 Va. 777, 129 S.E. 684 (1925). . . . . .43-22; 43-24
Drake v. Livesay, 231 Va. 117, 341 S.E.2d 186 (1986). . . . . .47-16
Draper v. Pauley, 253 Va. 78, 480 S.E.2d 495 (1997). . . . . .48-14
Dressler v. City of Covington, 208 Va. 520, 158 S.E.2d 660 (1968). . . . . .46-4; 46-24
Dressler v. Reserve Life Ins. Co., 200 Va. 689, 107 S.E.2d 406 (1959) . . . . . .47-42
Drinkard v. Commonwealth, 165 Va. 799, 183 S.E. 251 (1935). . . . . .1-9
Drumwright v. Walker, 167 Va. 307, 189 S.E. 310. .17-14
Du Pont v. Snead's Adm'r, 124 Va. 177, 97 S.E. 812 (1919). . . . . .1-7
Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 540 S.E.2d 129 (2001). . . . . .23-14; 25-6
Dudley v. Estate Life Ins. Co., 220 Va. 343, 257 S.E.2d 871 (1979) . . . . . .47-16
Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987). . . . . .40-2; 40-6; 40-8; 40-10
Dugroo v. Garrett, 203 Va. 918, 128 S.E.2d 303 (1962). . . . . .10-34
Dulany Foods, Inc. v. Ayers, 220 Va. 502, 260 S.E.2d 196 (1979). . . . . .45-24; 45-36
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593. .37-3; 37-18; 37-22; 37-52; 37-56; 37-58
Dungee, 258 Va. 235, 520 S.E.2d 164. . . . . .30-4
Dunlap v. Cottman Transmission Sys., LLC, 754 S.E.2d 313, 287 Va. 207 (2014). 40-11; 40-16, 40-17; 40-20
Dunn v. Strong, 216 Va. 205, 217 S.E.2d 831 (1975). 1-11, 1-12; 48-34, 48-35
Dunn Constr. Co. v. Cloney, 278 Va. 260, 682 S.E.2d 943 (2009) . . . . . .39-6

[References are to pages]

Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 708 S.E.2d 867.40-6; 40-8; 40-10, 40-11; 40-14

Durham v. Nat'l Pool Equip. Co., 205 Va. 441, 138 S.E.2d 55. . . . . .45-24

DurretteBradshaw, P.C. v. MRC Consulting, L.C., 277 Va. 140, 670 S.E.2d 704 (2009). . . . . .40-6; 40-8

Duvall, Blackburn, Hale & Downey v. Siddiqui, 243 Va. 494, 416 S.E.2d 448. . . . . .42-10

## E

E.I. Du Pont de Nemours & Co. v. Snead's Adm'r, 124 Va. 177, 97 S.E. 812. . . . . .1-7

E.I. du Pont de Nemours & Co. v. Universal Moulded Prods., Corp., 191 Va. 525, 62 S.E.2d 233. . .45-110; 45-112

E. Sutherland & Co. v. Gibson, 117 Va. 840, 86 S.E. 108 (1915). . . . . .45-78

Eason v. Eason, 203 Va. 246, 123 S.E.2d 361 (1962). . . . . .48-20, 48-21

East Augusta Mut. Fire Ins. Co. v. Hite, 219 Va. 677, 250 S.E.2d 348 (1979). . . . . .47-16

East Tenn. Nat. Gas Co. v. Riner, 239 Va. 94, 387 S.E.2d 476. . . . . .46-8; 46-24

Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967). . . . . .7-24; 35-3; 35-20; 35-22; 35-38

Eastern Shore of Virginia Fire Ins. Co. v. Kellam, 159 Va. 93, 165 S.E. 637 (1932). . . . . .47-18; 47-32

Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990). . . . . .1-8

Economopoulos v. Kolaitis, 259 Va. 806, 528 S.E.2d 714 (2000). . . . . .2-14

Eden v. Weight, 265 Va. 398, 578 S.E.2d 769. . . .39-2; 39-18

Edlow v. Arnold, 243 Va. 345, 415 S.E.2d 436 (1992). . . . . .10-14; 10-26

Edmiston v. Kupsenel, 205 Va. 198, 135 S.E.2d 777 (1964). . . . . .9-8

Edmonds v. Coldwell Banker Residential Real Estate Services, Inc., 237 Va. 428, 377 S.E.2d 443 (1989). . . . . .43-12

Edmonds v. Edmonds, 290 Va. 10, 772 S.E.2d 898 (2015). . . . . .48-11; 48-24; 48-28

Edwards v. City of Portsmouth, 237 Va. 167, 375 S.E.2d 747. . . . . .31-1

Edwards v. Cragg, 188 Va. 564, 50 S.E.2d 281 (1948). . . . . .43-4

Edwards v. Government Emples. Ins. Co., 256 Va. 128, 500 S.E.2d 819 (1998). . . . . .47-85

Edwards v. Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989). . . . . .31-1

Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971). . . . . .9-48

Edwards, 188 Va. 564, 50 S.E.2d 281. . . . . .43-5

Egan v. Butler, 290 Va. 62, 772 S.E.2d 765 (2015). 9-6; 9-34; 41-32

Eggleston v. Broadway-Manhattan Taxicab Corp., 194 Va. 584, 74 S.E.2d 212 (1953). . . . . .13-6

Eisenhower v. Jeter, 205 Va. 159, 135 S.E.2d 786 (1964). . . . . .7-16; 7-20; 9-48

Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967). . . . . .37-12; 37-33

Elkins v. United States, 307 F. Supp. 700 (1969). 34-58

Elliott v. Carter, 292 Va. 618, 791 S.E.2d 730 (2016). 4-22

Elliott v. Commonwealth, 277 Va. 457, 675 S.E.2d 178 (2009). . . . . .2-10

Elliott v. Interstate Life & Acci. Ins. Co., 211 Va. 240, 176 S.E.2d 314 (1970). . . . . .47-18; 47-32

Elliott v. Lewis, 207 Va. 361, 150 S.E.2d 129 (1966). . . . . .10-104

Elliott v. Shore Stop, Inc., 238 Va. 237, 384 S.E.2d 752 (1989). . . . . .39-11

Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 96 S.E. 754 (1918). . . . . .45-56

Elswick v. Collins, 194 Va. 292, 72 S.E.2d 626 (1952). . . . . .10-12

Emick v. Dairyland Ins. Co., 519 F.2d 1317. . . .47-84

Employers Commercial Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 200 S.E.2d 560 (1973). 39-22; 45-86; 47-44, 47-45; 47-48

Endicott v. Rich, 232 Va. 150, 348 S.E.2d 275 (1986). . . . . .6-12

Environmental Staffing Acquisition Corp. v. B & R Constr. Mgmt., 283 Va. 787, 725 S.E.2d 550. .45-10

Envirotech Corp. v. Halco Eng'g, 234 Va. 583, 364 S.E.2d 215. . . . . .45-120

Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt., 283 Va. 787, 725 S.E.2d 550 (2012). . . . . .45-10

Epes' Adm'r v. Hardaway, 135 Va. 80, 115 S.E. 712 (1923). . . . . .2-38, 2-39; 45-70

Epperson v. DeJarnette, 164 Va. 482, 180 S.E. 412 (1935). . . . . .8-28

Equitable Variable Life Ins. Co. v. Wood, 234 Va. 535, 362 S.E.2d 741. . . . . .47-12; 47-16; 47-18

Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862 (W.D. Va. 2016). . . . . .37-6

Erie Ins. Exch. v. Meeks, 223 Va. 287, 288 S.E.2d 454. . . . . .47-56

Erlich v. Hendrick Constr. Co., 217 Va. 108, 225 S.E.2d 665 (1976). . . . . .2-20

Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P.2d 298 (1963). . . . . .34-30

Esso Standard Oil Co. v. Williams, 202 Va. 362, 117 S.E.2d 93 (1960). . . . . .10-68

[References are to pages]

Estate of Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672, 643 S.E.2d 156 (2007) . . . . 6-4; 6-16
Estate of Parfitt v. Parfitt, 277 Va. 333, 672 S.E.2d 827 . . . . 45-100
Estate of Taylor v. Flair Property Assocs., 248 Va. 410, 448 S.E.2d 413 (1994) . . . . 9-12
Etheridge v. Medical Center Hospitals, 237 Va. 87, 376 S.E.2d 525 (1989) . . . . 35-2
Etheridge v. Norfolk S. R. Co., 143 Va. 789, 129 S.E. 680 (1925) . . . . 5-8
Etherton v. Doe, 268 Va. 209, 597 S.E.2d 87 (2004) . 2-28; 9-32; 11-6; 36-10; 36-28; 36-32
Eubank v. Spencer, 203 Va. 923, 128 S.E.2d 299 (1962) . . . . 2-42
Eubank v. Thomas, 300 Va. 201, 861 S.E.2d 397 (2021) . . . . 41-6; 41-14
Evaluation Research Corp. v. Alequin, 247 Va. 143, 439 S.E.2d 387 . . . . 39-18; 39-30; 39-38; 39-40; 39-42
Evans v. Evans, 280 Va. 76, 695 S.E.2d 173 (2010) . 4-2; 4-6; 9-18
Evans v. Michaelson, 135 S.E. 683, 146 Va. 64 (1926) . . . . 41-20
Evans v. NACCO Materials Handling Grp., Inc., 295 Va. 235, 810 S.E.2d 462 (2018) . . . . 34-28; 34-46
Ewell v. Elliott, 203 Va. 201, 123 S.E.2d 391 (1962) . 6-4
Ewing v. Haas, 132 Va. 215, 111 S.E. 255 (1922) . 42-4
Exxon Corp. v. Fulgham, 224 Va. 235, 294 S.E.2d 894 (1982) . . . . 9-5

## F

F.B.C. Stores, Inc. v. Duncan, 214 Va. 246, 198 S.E.2d 595 (1973) . . . 9-4; 9-38; 37-12; 37-36; 38-3; 38-18; 41-14; 41-32
FAD Ltd. Partnership v. Feagley, 237 Va. 413, 377 S.E.2d 437 (1989) . . . . 23-30; 24-20
Fairfax County Park Auth. v. Virginia Dep't of Transp., 247 Va. 259, 440 S.E.2d 610 (1994) . . . . 46-20
Fairfax County Redev. & Hous. Auth. v. Hurst & Assocs. Consulting Eng'rs, Inc., 231 Va. 164, 343 S.E.2d 294 . . . . 45-120
Fairfax Hosp. v. McCarty, 244 Va. 28, 419 S.E.2d 621 (1992) . . . . 33-4
Fairfax Hosp. Sys. v. Curtis, 249 Va. 531, 457 S.E.2d 66 (1995) . . . . 35-3; 35-9; 35-12
Fairfax Hosp. Sys., Inc. v. McCarty, 244 Va. 28, 419 S.E.2d 621 . . . . 9-6; 33-8; 35-26
Faison v. Hudson, 243 Va. 397, 417 S.E.2d 305 (1992) . . . . 2-24; 10-8
Family Ice Cream Corp. v. Beckner, 597 S.E.2d 34, 268 Va. 23 . . . . 39-2
Fancher v. Fagella, 274 Va. 549, 650 S.E.2d 519 (2007) . . . . 26-6
Fardis & Boudouris, 123 Va. 88, 96 S.E. 164 . . . . 2-42
Farmbest, 215 Va. 106, 205 S.E.2d 406 . . . . 46-25
Farmer v. Valley Marine Center, Inc., 206 Va. 737, 146 S.E.2d 265 (1966) . . . . 10-92
Farmers' Benevolent Fire Ins. Ass'n v. Kinsey, 101 Va. 236, 43 S.E. 338 . . . . 47-44, 47-45
Fary v. Aquino, 218 Va. 889, 241 S.E.2d 799 . . . . 42-22; 45-113
Fauntleroy v. Walker, 220 Va. 168, 257 S.E.2d 766 (1979) . . . . 45-110
Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 252 S.E.2d 358 (1979) . 34-16; 34-20; 34-36; 34-44; 34-46; 34-58; 34-62
Feddeman & Co. v. Langan Assocs., 260 Va. 35, 530 S.E.2d 668, 2000-2 Trade Cas. (CCH) P72961 (2000) . . . . 40-16; 40-20
Federal Ins. Co. v. Starr Elec. Co., 242 Va. 459, 410 S.E.2d 684 . . . . 45-74
Federal Land Bank v. Birchfield, 173 Va. 200, 3 S.E.2d 405 . . . . 37-14
Fein v. Wade, 191 Va. 203, 61 S.E.2d 29 (1950) . . . 6-18
Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 . . . . 31-1; 31-3; 32-6
Fenter v. Norfolk Airport Auth., 274 Va. 524, 649 S.E.2d 704 (2007) . . . . 44-14
Ferguson v. Ferguson, 187 Va. 581, 47 S.E.2d 346 (1948) . . . . 48-14
Ferguson v. Ferguson, 212 Va. 86, 181 S.E.2d 648 (1971) . . . . 4-22; 11-6
Fidelity & Cas. Co. v. Harlow, 191 Va. 64, 59 S.E.2d 872 . . . . 47-84
Fields v. Fields, 255 Va. 546, 499 S.E.2d 826 (1998) . . . . 48-20
Finch v. Garrett, 109 Va. 114, 63 S.E. 417 (1909) . 39-22
Finch v. McRae, 206 Va. 917, 147 S.E.2d 83 (1966) . . . . 10-18
Finck v. Brock, 202 Va. 948, 121 S.E.2d 373 (1961) . . . . 13-6
Firebaugh v. Hanback, 247 Va. 519, 443 S.E.2d 134 (1994) . . . . 43-22; 43-24
First Am. Bank v. J.S.C. Concrete Constr., Inc., 259 Va. 60, 523 S.E.2d 496 (2000) . . . . 45-62
First American Title Ins. Co. v. Seaboard Sav. & Loan Ass'n, 227 Va. 379, 315 S.E.2d 842 . . . . 45-62
First Church of Christ, Scientist v. Hutchings, 209 Va. 158, 163 S.E.2d 178 (1968) . . . . 48-18
First Prot. Life Ins. Co. v. Compton, 230 Va. 166, 335 S.E.2d 262 . . . . 47-32
First Va. Bank-Colonial v. Masri, 245 Va. 461, 428 S.E.2d 903 (1993) . . . . 45-44
First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983) . . . . 31-5, 31-6

[References are to pages]

Fisher v. Gordon, 210 Va. 523, 171 S.E.2d 835 (1970). . . . . .10-44; 10-64; 10-76
Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798. . . . . .1-2, 1-3
Fitzgerald v. Penthouse Int'l, 691 F.2d 666. . . . . .37-6
Fitzhugh v. Jones, 20 Va. 83 (1818). . . . . .45-24
Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) . 37-2, 37-3; 37-6; 37-8–37-10; 37-18; 37-48; 37-52; 37-56; 37-58
Floyd v. Nunn, 217 Va. 834, 232 S.E.2d 813 (1977).14-12
Fobbs v. Webb Bldg. Ltd. P'ship, 232 Va. 227, 349 S.E.2d 355. . . . . .2-28; 23-14
Foley v. Harris, 223 Va. 20, 286 S.E.2d 186 (1982). 26-6, 26-7; 26-12
Foltz v. Conrad Realty Co., 131 Va. 496, 109 S.E. 463 (1921). . . . . .43-4
Fonticello Mineral Springs Co. v. City of Richmond, 147 Va. 355, 137 S.E. 458. . . . . .46-6; 46-18; 46-20
Food Stores, Inc. v. Serv-N-Save, Inc., 247 Va. 187, 440 S.E.2d 606 (1994). . . . . .27-3
Foods First, Inc. v. Gables Assoc., 244 Va. 180, 418 S.E.2d 888. . . . . .45-66
Foote v. Commonwealth, 11 Va. App. 61, 396 S.E.2d 851 (1990). . . . . .36-14; 36-20
Forbes v. Rapp, 269 Va. 374, 611 S.E.2d 592 (2005). 9-18; 45-128
Ford v. Engleman, 118 Va. 89, 86 S.E. 852 (1915) . 45-104
Ford v. Gibson, 191 Va. 96, 59 S.E.2d 867, 59 S.E.2d 96. . . . . .43-6; 43-10; 43-12
Ford Motor Co. v. Bartholomew, 224 Va. 421, 297 S.E.2d 675 (1982). . . . . .2-20; 9-32; 34-44; 34-58; 34-62
Ford Motor Co. v. Boomer, 285 Va. 141, 736 S.E.2d 724 (2013). . . . . .4-16; 5-4; 5-6; 5-8
Foreign Mission Bd. of Southern Baptist Convention v. Wade, 242 Va. 234, 409 S.E.2d 144 (1991). . . 9-32
Foreman v. German Alliance Ins. Ass'n, 104 Va. 694, 52 S.E. 337 (1905). . . . . .47-45
Forest Lakes Cmty. Ass'n v. United Land Corp. of Am., 293 Va. 113, 795 S.E.2d 875 (2017). . .26-3; 26-12; 26-14; 26-18
Foretich v. Capital Cities/ABC, 37 F.3d 1541 (4th Cir. 1994). . . . . .37-6
Forrest v. Lynch, 347 So. 2d 1255 (La. Ct. App. 1977). . . . . .37-3
Foster v. Commonwealth, 13 Va. App. 380, 412 S.E.2d 198 (1991). . . . . .36-14; 36-20
Fowler v. American Fed'n of Tobacco Growers, Inc., 195 Va. 770, 80 S.E.2d 554 (1954). . . . . .42-8
Fox-Sadler Co. v. Earl E. Norris Roofing Co., 229 Va. 106, 327 S.E.2d 95 (1985). . . . . .45-46; 45-128
Francisco v. Neel, 167 Va. 13, 187 S.E. 495. . . .39-34
Franconia Assocs. v. Clark, 250 Va. 444, 463 S.E.2d 670 (1995). . . .23-8; 23-10; 23-12; 23-14; 23-26; 23-28
Franklin v. McLean, 192 Va. 684, 66 S.E.2d 504 (1951). . . . . .48-24
Franklin v. Richlands, 161 Va. 156, 170 S.E. 718 . 31-5
Franklin, 192 Va. 684, 66 S.E.2d 504. . . . . .48-24
Franklin Fire Ins. Co. v. Bolling, 173 Va. 228, 3 S.E.2d 182. . . . . .47-60
Frazier v. City of Norfolk, 234 Va. 388, 362 S.E.2d 688. . . . . .4-22
Frazier v. Conner, 191 Va. 481, 61 S.E.2d 880 (1950). . . . . .7-4
Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88 (1975). . . . . .3-14; 49-8
Frederick County Sch. Bd. v. Hannah, 267 Va. 231, 590 S.E.2d 567 (2004). . . . . .12-2
Freedlander v. Edens Broadcasting, Inc., 734 F. Supp. 221. . . . . .37-3
Freeman v. City of Norfolk, 221 Va. 57, 266 S.E.2d 885 (1980). . . . . .31-5; 32-6
Freezer v. Miller, 163 Va. 180, 176 S.E. 159 (1934).41-10; 41-12; 41-16
French v. Stange Mining Co., 114 S.E. 121, 133 Va. 602 (1922). . . . . .27-10; 27-12
Friday-Spivey v. Collier, 268 Va. 384, 601 S.E.2d 591 . (2004). . . . . .11-3; 31-5
Fried v. Smith, 244 Va. 355, 421 S.E.2d 437 (1992).45-63; 45-74
Friedman v. Jordan, 166 Va. 65, 184 S.E. 186 (1936).4-30, 4-31; 9-38
Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 597 S.E.2d 34. . . . . .39-2; 39-34; 45-100; 48-34
Fruit Growers Express Co. v. Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976). . . . . .46-18
Fultz v. Delhaize Am., Inc., 278 Va. 84, 677 S.E.2d 272 (2009). . . . . .6-4; 23-14; 23-30; 24-20
Funkhouser v. Ford Motor Co., 285 Va. 272, 736 S.E.2d 309 (2013). . . . . .2-16; 34-16; 34-18; 34-46
Furgason v. Clausen, 785 P.2d 242, 109 N.M. 331 (N.M. Ct. App. 1989). . . . . .37-3
Furman v. Call, 234 Va. 437, 362 S.E.2d 709 (1987). . . . . .10-92
Furrow v. State Farm Mut. Auto. Ins. Co., 237 Va. 77, 375 S.E.2d 738 (1989). . . . . .2-39
Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 575 S.E.2d 858 (2003). . . . . .37-11; 37-32

## G

G.L. Webster Co. v. Steelman, 172 Va. 342, 1 S.E.2d 305 (1939). . . . . .26-3; 26-12; 26-14

[References are to pages]

Gaalaas v. Morrison, 233 Va. 148, 353 S.E.2d 898 (1987) . . . . . 1-7; 1-9
Gabbard v. Knight, 202 Va. 40, 116 S.E.2d 73 (1960). . . . . .23-22
Gale v. Wilber, 163 Va. 211, 175 S.E. 739 (1934) . 10-8
Galliher v. Commonwealth, 161 Va. 1014, 170 S.E. 734 (1933). . . . . .38-10
Gamble v. Hill, 208 Va. 171, 156 S.E.2d 888 (1967) . 9-40
Gambrell v. City of Norfolk, 267 Va. 353, 593 S.E.2d 246 (2004). . . . . .31-5; 32-6
Gammon v. Hyde, 199 Va. 918, 103 S.E.2d 221 (1958). . . . . .10-86
Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954) . . . . . 15-4
Gardner v. Phipps, 250 Va. 256, 462 S.E.2d 91 (1995) . . . . . 6-4, 6-5; 6-27; 7-4
Garnot v. Johnson, 239 Va. 81, 387 S.E.2d 473 (1990) . . . . . .7-4; 10-12; 10-14
Garrett v. I.R. Witzer Co., 258 Va. 264, 518 S.E.2d 635 (1999). . . . . .34-20; 34-26; 34-44
Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). . . . . .37-8
Gasque v. Mooers Motor Car Co., 227 Va. 154, 313 S.E.2d 384 (1984) . . . . . .9-33, 9-34; 28-4; 45-4
Gaut v. Pyles, 212 Va. 39, 181 S.E.2d 645 (1971) . 41-6; 41-10; 41-32
Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E. 2d 713 (1985). .37-3; 37-8–37-10; 37-26; 37-32; 37-48, 37-49; 37-52, 37-53; 37-56; 37-58, 37-59
Gelber v. Glock, 293 Va. 497, 800 S.E.2d 800 (2017). . . . . .39-30; 40-17; 48-34
Gelles & Sons Gen. Contr., Inc. v. Jeffrey Stack, Inc., 264 Va. 285, 569 S.E.2d 406 (2002) . . . . . 44-8
General Acci. Fire & Life Assurance Corp. v. Aetna Casualty & Surety Co., 158 S.E.2d 750, 208 Va. 467 (1968) . . . . . 16-2
General Appliance Storage Co. v. Richmond, Fredericksburg & Potomac R.R., 221 Va. 176, 267 S.E.2d 161 . . . . . .45-86
General Bronze Corp. v. Kostopulos, 203 Va. 66, 122 S.E.2d 548 (1961) . . . . . .34-44; 34-46
Geo. Home Ins. Co. v. Kinnier's Adm'X, 69 Va. 88 (1877). . . . . .47-12; 47-44; 47-50
Geoghegan Sons & Co. v. Arbuckle Bros., 139 Va. 92, 123 S.E. 387. . . . . .45-52
George Robberecht Seafood, Inc. v. Maitland Bros., 220 Va. 109, 255 S.E.2d 682 . . . . . .45-106
Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S.E. 366 (1898). . . . . .47-52
Georgia Home Ins. Co. v. Kinnier, 69 Va. 88 . . . 47-44
Gertler v. Bowling, 116 S.E.2d 268, 202 Va. 213 (1960). . . . . .45-116
Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). . .37-3; 37-6–37-8; 37-10, 37-11; 37-18, 37-19; 37-22; 37-48; 37-52; 37-56; 37-58
Giant of Va., Inc. v. Pigg, 207 Va. 679, 152 S.E.2d 271. . . . . .9-38; 41-6; 41-10; 41-14; 41-30; 41-32
Gibbs v. Gibbs, 239 Va. 197, 387 S.E.2d 499 (1990). . . . . .48-20; 48-38
Gibney & Co. v. Arlington Brewery Co., 112 Va. 117, 70 S.E. 485 . . . . . 45-26
Gibson v. Commonwealth, 287 Va. 311, 756 S.E.2d 460 (2014). . . . . .49-6; 49-8; 49-16
Gill v. Gill, 219 Va. 1101, 254 S.E.2d 122 (1979).48-35
Gilley v. Union Life Ins. Co., 194 Va. 966, 76 S.E.2d 165 (1953). . . . . .47-18; 47-60; 47-64
Gilliam v. Immel, 293 Va. 18, 795 S.E.2d 458 (2017). . . . . .9-8
Gilliam, 211 Va. 542, 178 S.E.2d 499 . . . . . .18-30
Gilmer v. Brown, 186 Va. 630, 44 S.E.2d 16 (1947).48-20
Gina Chin & Assocs., Inc. v. First Union Bank, 260 Va. 533, 537 S.E.2d 573 (2000) . . 8-8; 8-10; 8-16; 8-22
Glascock v. James, 32 S.E.2d 734, 183 Va. 561 (1948). . . . . .43-20
Glenn v. Augusta Perpetual Bldg. & Loan Co., 99 Va. 695, 40 S.E. 25 (1901). . . . . .45-72
Glenn v. Haynes, 192 Va. 574, 66 S.E.2d 509 (1951). . . . . .42-4; 42-8
Glens Falls Indem. Co. v. Harris, 168 Va. 438, 191 S.E. 644 (1937) . . . . . .47-56
Glisson v. Loxley, 235 Va. 62, 366 S.E.2d 68 (1988) . . . . . .35-2
Globe & Rutgers Fire Ins. Co. v. Stallard, 68 F.2d 237 . . . . . .47-54
Globe Mut. Life Ins. Co. v. Wolff, 95 U.S. 326, 24 L. Ed. 387 (1877) . . . . . .47-12
Glover v. Herald Co., 549 S.W.2d 858 (Mo. 1977).37-3
Going v. Norfolk & W. R. Co., 248 U.S. 538, 39 S. Ct. 22, 63 L. Ed. 409 (1918) . . . . . .21-4
Going v. Norfolk & W. Ry. Co., 119 Va. 543, 89 S.E. 914 (1916) . . . . . .21-4
Golding v. Floyd, 261 Va. 190, 539 S.E.2d 735 (2001) . . . . . .44-6; 45-29
Goldstein v. Old Dominion Peanut Corp., 177 Va. 716, 15 S.E.2d 103 (1941) . . . . . .45-82; 45-86
Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922). .48-32
Good v. Dyer, 137 Va. 114, 119 S.E. 277 (1923) . 45-36
Goode v. Burke Town Plaza, 246 Va. 407, 436 S.E.2d 450 (1993). . . . . .45-104
Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S.E. 744 (1895). . . . . .47-12, 47-13

[References are to pages]

Goodstein v. Weinberg, 219 Va. 105, 245 S.E.2d 140 (1978) . . . . . 42-9; 45-4
Goodwin v. Hare, 246 Va. 402, 436 S.E.2d 605 (1993) . . . . . 6-27; 36-6
Gordon v. Liberty Mut. Ins. Co., 675 F. Supp. 321 (E.D. Va. 1987) . . . . . 47-84
Gordonsville Energy, L.P. v. Virginia Elec. & Power Co., 257 Va. 344, 512 S.E.2d 811 . . . . . 45-124
Goriczynski v. Poston, 248 Va. 271, 448 S.E.2d 423 (1994) . . . . . 48-24, 48-25
Gorman, 191 Va. 344, 61 S.E.2d 33 . . . . . 46-20
Gossett v. Jackson, 249 Va. 549, 457 S.E.2d 97 (1995) . . . . . 11-6
Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955). 6-12
Gov't Emples. Ins. Co. v. United Servs. Auto. Ass'n, 281 Va. 647, 708 S.E.2d 877 (2011) . . . . . 2-28; 47-84
Gov't Micro Res., Inc. v. Jackson, 271 Va. 29, 624 S.E.2d 63 (2006). . . . . 9-33; 37-13; 37-26
Government Emples. Ins. Co. v. Moore, 266 Va. 155, 580 S.E.2d 823 (2003) . . . . . 47-29; 47-85
Government Employees Ins. Co. v. Gallop, 224 Va. 720, 125 S.E. 2d 525 (1983) . . . . . 2-44
Government Empls. Ins. Co. v. United Servs. Auto. Ass'n, 281 Va. 647, 708 S.E.2d 877 . . . 2-28; 47-84
Government Micro Resources, Inc. v. Jackson, 271 Va. 29, 624 S.E.2d 63 . . . . . 37-13; 37-48
Graddy v. Hatchett, 233 Va. 65, 353 S.E.2d 741 (1987) . . . . . 9-48; 10-72
Grand T. W. R. Co. v. Lindsay, 233 U.S. 42, 34 S. Ct. 581, 58 L. Ed. 838 (1914) . . . . . 21-18
Granite State Ins. Co. v. Bottoms, 243 Va. 228, 415 S.E.2d 131 (1992). . . . . 47-76
Grant v. Mays, 204 Va. 41, 129 S.E.2d 10 (1963) . 6-14
Gravitt v. Ward, 258 Va. 330, 518 S.E.2d 631 (1999). 5-6; 6-2; 6-5; 35-3; 35-42
Gray v. Inova Health Care Servs., 257 Va. 597, 514 S.E.2d 355 (1999) . . . . . 33-4; 33-8
Gray v. Rhoads, 268 Va. 81, 597 S.E.2d 93 (2004). . 2-30; 2-34
Gray & Gregory, Pshp. v. GTE South, Inc., 261 Va. 67, 540 S.E.2d 498 (2001) . . . . . 46-8; 46-20
Great Atl. & Pac. Tea Co. v. Rosenberger, 203 Va. 378, 124 S.E.2d 26 . . . . . 23-16
Great Coastal Express v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985) . . 9-33; 37-2; 37-8; 37-10, 37-11; 37-18; 37-32, 37-33; 37-48; 37-52; 37-56
Greater Richmond Transit Co. v. Wilkerson, 242 Va. 65, 406 S.E.2d 28 (1991). . . . . 6-26; 22-16
Greear v. Noland Co., 197 Va. 233, 89 S.E.2d 49 (1955). . . . . 7-16; 7-20
Green v. Diagnostic Imaging Associates, P.C., 299 Va. 1, 843 S.E.2d 371 . . . . . 9-14; 9-41
Green v. Goodman-Gable-Gould Co., 268 Va. 102, 597 S.E.2d 77 (2004) . . . . . 45-134
Green v. Ingram, 269 Va. 281, 608 S.E.2d 917 (2005). . . . . 4-6; 4-22; 4-26; 4-30; 9-32; 11-6
Green's Ex'rs v. Smith, 146 Va. 442, 131 S.E. 846 (1926). . . . . 28-14; 45-24; 45-28
Greenland Dev. Corp. v. Allied Heating Prods. Co., 184 Va. 588, 35 S.E.2d 801 . . . . . 34-16; 34-18
Greensboro Nat'l Life Ins. Co. v. Southside Bank, 206 Va. 263, 142 S.E.2d 551 (1965). . . . . 47-61
Greenwood Assocs. v. Crestar Bank, 248 Va. 265, 448 S.E.2d 399 (1994) . . . . . 45-18; 45-42
Gregory v. Hawkins, 251 Va. 471, 468 S.E.2d 891 (1996) . . . . . 35-3
Gregory v. Providence Wash. Ins. Co., 214 Va. 134, 198 S.E.2d 616 . . . . . 47-36
Griffett v. Ryan, 247 Va. 465, 443 S.E.2d 149 (1994) . . . . . 35-8; 35-12; 35-22
Griffin v. Shively, 227 Va. 317, 315 S.E.2d 210 (1984). . . . . 4-2; 4-22; 4-30, 4-31; 6-20; 11-6
Grim v. Rahe, Inc., 246 Va. 239, 434 S.E.2d 888 (1993). . . . . 23-14; 23-22
Groggins v. Commonwealth, 34 Va. App. 19, 537 S.E.2d 605 (2000). . . . . 2-34
Gross v. Stuart, 297 Va. 769, 831 S.E.2d 726 . . . 35-28
Group Hosp. Med. Serv. v. Smith, 236 Va. 228, 372 S.E.2d 159 . . . . . 47-28
Grubb v. Grubb, 272 Va. 45, 630 S.E.2d 746 (2006). 39-18; 39-34
GSHH Richmond, Inc. v. Imperial Assocs., 253 Va. 98, 480 S.E.2d 482. . . . . 45-18
Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974). . . . . 24-10, 24-11
Gulfstream Bldg. Assoc., Inc. v. Britt, 239 Va. 178, 387 S.E.2d 488 (1990) . . . . . 3-12; 3-14; 49-8
Gunn v. Richmond Community Hosp., 235 Va. 282, 367 S.E.2d 480. . . . . 44-2
Gunnell v. Nello L. Teer Co., 205 Va. 28, 135 S.E.2d 104 (1964). . . . . 45-96
Gupton v. Quicke, 247 Va. 362, 442 S.E.2d 658 (1994) . . . . . 23-14; 25-6
Gwaltney v. Reed, 196 Va. 505, 84 S.E.2d 501 (1954). . . . . 9-12; 45-116

## H

H.M. Gleason & Co. v. Int'l Harvester Co., 197 Va. 255, 88 S.E.2d 904 . . . . . 34-16; 34-44; 34-54
H.W. Miller Trucking Co. v. Flood, 203 Va. 934, 128 S.E.2d 437 (1962). . . . . 1-7; 1-9
Haass & Broyles Excavators, Inc. v. Ramey Bros. Excavating Co., 233 Va. 231, 355 S.E.2d 312.45-110

[References are to pages]

Hack v. Nester, 241 Va. 499, 404 S.E.2d 42 . 7-10; 9-32; 15-8
Hadeed v. Medic-24, Ltd., 237 Va. 277, 377 S.E.2d 589 (1989) . . . . . 8-6; 8-28
Hailes v. Gonzales, 207 Va. 612, 151 S.E.2d 388 (1966) . . . . . 9-12
Hailey v. Johnson, 201 Va. 775, 113 S.E.2d 664 (1960) . . . . . 4-12
Haislip v. Southern Heritage Ins. Co., 254 Va. 265, 492 S.E.2d 135 . . . . . 16-2
Hall v. Commonwealth, 233 Va. 369, 355 S.E.2d 591 (1987) . . . . . 2-30
Hall v. Hall, 181 Va. 67, 23 S.E.2d 810 (1943) . . . 8-10
Hall v. Hall, 240 Va. 360, 397 S.E.2d 829 (1990) . 6-10; 9-7
Hall v. Hockaday, 206 Va. 792, 146 S.E.2d 215 ((1960)) . . . . . 17-6
Hamer v. School Bd. of Chesapeake, 240 Va. 66, 393 S.E.2d 623 (1990) . . . . . 46-6; 46-36
Hamilton v. Glemming, 187 Va. 309, 46 S.E.2d 438 (1948) . . . . . 10-44
Hamilton Dev. Co. v. Broad Rock Club, 248 Va. 40, 445 S.E.2d 140 (1994) . . . . . 9-32; 9-34; 27-3
Hamlet v. Hayes, 273 Va. 437, 641 S.E.2d 115 (2007) . . . . . 45-46
Hamm v. Scott, 258 Va. 35, 515 S.E.2d 773 (1999) . 45-18; 45-42
Hammerhead Enterprises, Inc. v. Brezenoff, 551 F. Supp. 1360 (S.D.N.Y. 1982) . . . . . 37-6
Hampton Rds. Bankshares, Inc. v. Harvard, 291 Va. 42, 781 S.E.2d 172 . . . . . 45-96
Hampton Rds. Sanitation Dist. v. McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987) . . . . . 27-6
Hampton Rds. Seventh-Day Adventist Church v. Stevens, 275 Va. 205, 657 S.E.2d 80 (2008) . . . 48-14; 48-18
Hampton Roads Bankshares, Inc. v. Harvard, 291 Va. 42, 781 S.E.2d 172 . . . . . 45-96
Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987) . . . . . 26-10; 27-6
Hancock-Underwood v. Knight, 277 Va. 127, 670 S.E.2d 720 (2009) . . . 4-2; 7-2; 7-4; 7-6; 7-8; 10-32; 17-12
Handberg v. Goldberg, 297 Va. 660, 831 S.E.2d 700 (2019) . . . . . 37-2; 37-13; 37-22; 37-27
Hannan v. Dusch, 153 S.E. 824, 154 Va. 356 (1930) . . . . . 45-128
Hanover Fire Ins. Co. v. Drake, 170 Va. 257, 196 S.E. 664 (1938) . . . . . 47-44; 47-52
Hanson v. Harding, 245 Va. 424, 429 S.E.2d 20 (1993) . . . . . 39-2
Harkins v. Reynolds Assocs., 221 Va. 1128, 227 S.E.2d 222 . . . . . 45-116
Harless v. Atlantic Life Ins. Co., 186 Va. 826, 44 S.E.2d 430 (1947) . . . . . 2-52
Harlow v. Clatterbuck, 230 Va. 490, 339 S.E.2d 181 (1986) . . . . . 37-12
Harman v. Cundiff, 82 Va. 239 . . . . . 37-58
Harman v. Honeywell Int'l, Inc., 288 Va. 84, 758 S.E.2d 515 (2014) . . . . . 1-2; 1-8; 5-4, 5-5; 5-8
Harper v. B&W Bandag Center, Inc., 226 Va. 469, 311 S.E.2d 104 (1984) . . . . . 2-24
Harper v. Commonwealth, 196 Va. 723, 85 S.E.2d 249 (1955) . . . . . 36-14
Harrah v. Washington, 252 Va. 285, 477 S.E.2d 281 (1996) . . . . . 7-4; 10-104, 10-105; 10-112
Harrell v. City of Norfolk, 265 Va. 500, 578 S.E.2d 756 (2003) . . . . . 31-1, 31-2; 31-5; 32-6; 32-12
Harrell v. N.C. Mut. Life Ins. Co., 215 Va. 829, 213 S.E.2d 792 . . . . . 47-60
Harrell v. Virginia Elec. & Power Co., 177 Va. 59, 12 S.E.2d 833 . . . . . 10-16
Harrell v. Woodson, 233 Va. 117, 353 S.E.2d 770 (1987) . . . . . 9-2; 9-33; 15-4
Harris v. Bankers Life & Cas. Co., 222 Va. 45, 278 S.E.2d 809 . . . . . 47-66; 47-68
Harris v. Cary, 112 Va. 362, 71 S.E. 551 (1911) . 45-104
Harris v. Commonwealth, 134 Va. 688, 114 S.E. 597 (1922) . . . . . 1-7
Harris v. Criterion Ins. Co., 222 Va. 496, 281 S.E.2d 878 (1981) . . . . . 47-48
Harris v. Diamond Const. Co., 36 S.E.2d 573, 184 Va. 711 (1946) . . . . . 42-14; 44-2
Harris v. Dunham, 127 S.E.2d 65, 203 Va. 760 (1962) . . . . . 39-16; 39-24; 45-106
Harris v. Harris, 216 Va. 716, 222 S.E.2d 543 (1976) . . . . . 48-28
Harris v. K&K Ins. Agency, 249 Va. 157, 453 S.E.2d 284 (1995) . . . . . 47-10
Harris v. Kreutzer, 271 Va. 188, 624 S.E.2d 24 (2006) . . . . . 33-2; 33-10; 33-14
Harris v. T.I., Inc., 243 Va. 63, 413 S.E.2d 605 (1992) . . . . . 34-2
Harris, 216 Va. 716, 222 S.E.2d 543 . . . . . 48-28
Harris Motor Lines, Inc. v. Green, 184 Va. 984, 37 S.E.2d 4 (1946) . . . . . 6-24; 10-16
Harrison v. Provident Relief Ass'n, 141 Va. 659, 126 S.E. 696 . . . . . 47-24
Harris-Teeter, Inc. v. Burroughs, 241 Va. 1, 399 S.E.2d 801 (1991) . . . . . 34-26; 34-32
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 . 37-7; 37-18; 37-22
Hartford Acci. & Indem. Co. v. Peach, 193 Va. 260, 68 S.E.2d 520 (1952) . . . . . 47-84
Hartford Fire Ins. Co. v. Davis, 246 Va. 495, 436 S.E.2d 429 (1993) . . . . . 47-84

[References are to pages]

Hartford Fire Ins. Co. v. Mutual Sav. & Loan Co., 193 Va. 269, 68 S.E.2d 541 (1952). . . . . 47-45
Haslip in Mattison v. Dallas Carrier Corp., 947 F.2d 95 . . . . . 9-35
Hatcher v. Commonwealth, 218 Va. 811, 241 S.E.2d 756 (1978). . . . . 1-8
Hatfill v. N.Y. Times Co., 532 F.3d 312 (4th Cir. 2008) . . . . . 37-6; 37-8
Hawthorn v. City of Richmond, 253 Va. 283, 484 S.E.2d 603 (1997) . . . . . 26-2; 31-3
Hawthorne v. Hannowell, 202 Va. 70, 115 S.E.2d 889 (1960) . . . . . 43-6
Hawthorne v. VanMarter, 279 Va. 566, 692 S.E.2d 226 (2010) . . . . . 6-24; 10-16; 11-6; 11-10; 11-12
Haycox v. Dunn, 200 Va. 212, 104 S.E.2d 800 . . . 37-33
Hayes v. Durham Life Ins. Co., 198 Va. 670, 96 S.E.2d 109 (1957) . . . . . 47-28, 47-29
Haymore v. Brizendine, 172 S.E.2d 774, 210 Va. 578 (1970). . . . . 16-6; 16-8
Haynes v. Glenn, 197 Va. 746, 91 S.E.2d 433 (1956). 9-24
Haynes Chem. Corp. v. Staples & Staples, Inc., 133 Va. 82, 112 S.E. 802. . . . . 45-60; 45-82
Haywood v. Massie, 188 Va. 176, 49 S.E.2d 281 (1948) . . . . . 9-18
Haywood v. South Hill Mfg. Co., 128 S.E. 362, 142 Va. 761 (1925) . . . . . 30-10
H-B Ltd. P'ship v. Wimmer, 220 Va. 176, 257 S.E.2d 770. . . . . 43-2; 43-22; 43-24
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) . . 25-4
Hegwood v. Virginia Natural Gas Inc., 256 Va. 362, 505 S.E.2d 372 (1998) . . . . . 30-4; 30-8
Heider v. Clemons, 241 Va. 143, 400 S.E.2d 190 (1991) . . . . . 11-6; 11-10; 11-16
Heinzman v. Fine, Fine, Legum & Fine, 217 Va. 958, 234 S.E.2d 282. . . . . 42-22; 45-113
Helmick v. Commonwealth, 38 Va. App. 558, 567 S.E.2d 551 (2002) . . . . . 1-8
Helmick Family Farm, LLC v. Comm'r of Highways, 297 Va. 777, 832 S.E.2d 1 (2019). . . . . 46-20
Helton v. Phillip A. Glick Plumbing, Inc., 277 Va. 352, 672 S.E.2d 842 (2009) . . . . . 44-8
Hemming, 221 Va. 1143, 277 S.E.2d 230. . . . . 15-4
Henderson v. Gay, 245 Va. 478, 429 S.E.2d 14 (1993). . . . . 10-86
Henderson v. Henderson, 183 Va. 663, 33 S.E.2d 181 (1945). . . . . 48-18
Henderson v. Henderson, 255 Va. 122, 495 S.E.2d 496 . . . . . 39-30; 39-42
Hendricks v. Virginia Elec. & Power Co., 161 Va. 793, 172 S.E. 160. . . . . 14-12
Hendrickson v. Meredith, 161 Va. 193, 170 S.E. 602 (1933) . . . . . 44-14; 45-54; 45-56; 45-132
Henley v. Mason, 154 Va. 381, 153 S.E. 653 (1930). 35-22
Henning v. Kyle, 190 Va. 247, 56 S.E.2d 67 (1949). 39-28
Henry v. R.K. Chevrolet, Inc., 219 Va. 1011, 254 S.E.2d 66. . . . . 39-28; 40-22
Henry Myers & Co. v. Lewis, 121 Va. 50, 92 S.E. 988 (1917) . . . . . 8-40
Hensley v. Moretz, 197 Va. 440, 90 S.E.2d 183 (1955). . . . . 43-4, 43-5
Heron v. Transp. Cas. Ins. Co., 274 Va. 534, 650 S.E.2d 699 (2007) . . . . . 45-52; 45-66
Herr v. Wheeler, 272 Va. 310, 634 S.E.2d 317 (2006) . . . . . 7-4, 7-5
Herrell v. Board of Sup'rs Prince William Cnty., 113 Va. 594, 75 S.E. 87. . . . . 42-18
Hershman v. Payne, 196 Va. 241, 83 S.E.2d 418 (1954). . . . . 10-66
Hibbs v. First Nat'l Bank, 133 Va. 94, 112 S.E. 669. 44-10
Hicks v. Cassidy, 208 Va. 610, 159 S.E.2d 827 (1968). . . . . 10-44
Hicks v. Chesapeake & Ohio R.R. Co., 45 S.E. 888, 102 Va. 197 (1903). . . . . 32-2
Hicks v. Wynn, 119 S.E. 133, 137 Va. 186 (1923). 39-6; 39-38
Higgins v. Bowdoin, 238 Va. 134, 380 S.E.2d 904 (1989). . . . . 3-14; 49-8
High Knob, Inc. v. Allen, 205 Va. 503, 138 S.E.2d 49 (1964). . . . . 45-46; 45-52; 45-62
Hilfiger v. Transamerica Occidental Life Ins. Co., 256 Va. 265, 505 S.E.2d 190 (1998). . . . . 47-24; 47-29
Hill v. Lee, 209 Va. 569, 166 S.E.2d 274 (1969). . 15-4
Hill v. Leigh Mem'l Hosp., Inc., 204 Va. 501, 132 S.E.2d 411 . . . . . 35-46
Hillsville v. Nester, 215 Va. 4, 205 S.E.2d 398 (1974). . . . . 32-18
Hilton v. Commonwealth, 293 Va. 293, 797 S.E.2d 781 (2017). . . . . 1-9
Hilton v. Martin, 275 Va. 176, 654 S.E.2d 572 (2008) . . . . . 33-10; 36-3; 36-7; 36-11
Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 188 W. Va. 157 (W. Va. 1992) . . . . . 37-3
Hines v. Commonwealth, 292 Va. 674, 791 S.E.2d 563 (2016). . . . . 36-14
Hinkley v. Koehler, 269 Va. 82, 606 S.E.2d 803 (2005) . . . . . 35-9; 35-12
Hirman v. Rogers, 257 N.W.2d 563 (Minn. 1977) . 37-3
Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960). . . . . 9-6

[References are to pages]

Hoar v. Great E. Resort Mgmt., Inc., 256 Va. 374, 506 S.E.2d 777 (1998) . . . . . 6-4; 6-24; 6-26
Hodge v. American Family Life Assur. Co., 213 Va. 30, 189 S.E.2d 351 (1972) . . . . . 2-10
Hodnett v. Friend, 232 Va. 447, 352 S.E.2d 338 (1987) . . . . . 10-18; 10-80; 15-4
Hoffman v. Washington Post Co., 433 F. Supp. 600 (D.D.C. 1977) . . . . . 37-3
Hoffman Family, L.L.C. v. City of Alexandria, 272 Va. 274, 634 S.E.2d 722 (2006) . . . . . 46-2; 46-6
Hoffner v. Kreh, 227 Va. 48, 313 S.E.2d 656 (1984).15-4
Hogan v. Callas, 139 Va. 137, 123 S.E. 361 (1924) . 44-10
Hogan v. Carter, 226 Va. 361, 310 S.E.2d 666 (1983) . . . . . 2-20; 10-64; 10-72
Hogan v. Wilmoth, 57 Va. 80 (1860). . . . . 37-66
Hoge v. Anderson, 200 Va. 364, 106 S.E.2d 121 (1958) . . . . . 9-5
Hogg v. Plant, 145 Va. 175, 133 S.E. 759 (1926). . 9-33
Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) . . . . . 31-1; 31-3
Holiday Motor Corp. v. Walters, 292 Va. 461, 790 S.E.2d 447 (2016) . . . . . 34-20; 34-26; 34-28; 34-44
Holland v. Shively, 243 Va. 308, 415 S.E.2d 222 (1992). . . . . 24-14
Holley v. Pambianco, 270 Va. 180, 613 S.E.2d 425 (2005). . . . . 35-42
Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 404 S.E.2d 48 (1991) . . . . . 29-2; 29-6
Holmes v. Levine, 273 Va. 150, 639 S.E.2d 235 (2007) . . . . . 5-4; 5-8
Holston v. Pennington, 225 Va. 551, 304 S.E.2d 287 (1983). . . . . 45-14
Holt v. Chalmeta, 295 Va. 22, 809 S.E.2d 636 (2018) . . . . . 35-8, 35-9; 35-12; 35-22
Holz v. Coates Motor Co., 147 S.E.2d 152, 206 Va. 894 (1966) . . . . . 45-116
Home Beneficial Ass'n v. Field, 162 Va. 63, 173 S.E. 370 (1934). . . . . 47-44; 47-50
Honeywell v. Elliott, 213 Va. 86, 189 S.E.2d 331.45-16
Honsinger v. Egan, 266 Va. 269, 585 S.E.2d 597 (2003) . . . . . 1-7, 1-8
Hooff v. Paine, 172 Va. 481, 2 S.E.2d 313 (1939). . 45-18; 45-42
Hooked Grp., LLC v. City of Chesapeake, 842 S.E.2d 413, 298 Va. 663 (2020). . . . . 46-28
Hop-In Food Stores v. Serv-N-Save, 247 Va. 187, 440 S.E.2d 606 (1994) . . . . . 27-14
Hopson v. Goolsby, 196 Va. 832, 86 S.E.2d 149 (1955) . . . . . 14-4
Horace Mann Ins. Co. v. Government Employees Ins. Co., 231 Va. 426, 344 S.E.2d 906 (1986) . 45-36; 47-88
Horne v. Bridwell, 68 S.E.2d 535, 193 Va. 381 (1952) . . . . . 41-2
Horne v. WTVR, LLC, 893 F.3d 201 (4th Cir. 2018). . . . . 37-3
Horner v. Ahern, 153 S.E.2d 216, 207 Va. 860 (1967). . . . . 39-10; 39-24
Horner v. Speed, 2 Patton & H. 616. . . . . 45-40
Horner, 207 Va. 860, 153 S.E.2d 216 . . . . . 39-10
Horsley v. Chesapeake & Ohio Ry. Co., 191 Va. 628, 61 S.E.2d 868 (1950) . . . . . 18-14
Horton v. Horton, 254 Va. 111, 407 S.E.2d 200. .45-82, 45-83
Hot Shot Express, Inc. v. Brooks, 264 Va. 126, 563 S.E.2d 764 (2002) . . . . . 10-12; 10-104; 10-112
Housing Auth. v. East Tenn. Light & Power Co., 183 Va. 64, 31 S.E.2d 273 . . . . . 45-96
Houston v. Strickland, 184 Va. 994, 37 S.E.2d 64 (1946) . . . . . 22-8
Howard v. Alexandria Hosp., 245 Va. 346, 429 S.E.2d 22 (1993). . . . . 9-7
Howell v. Cahoon, 236 Va. 3, 372 S.E.2d 363 (1988).7-5; 9-40; 10-54; 10-62
Howell v. Sobhan, 278 Va. 278, 682 S.E.2d 938. . .5-4
Howsare v. Commonwealth, 293 Va. 439, 799 S.E.2d 512 (2017). . . . . 1-2
Hubbard v. Commonwealth, 243 Va. 1, 413 S.E.2d 875 (1992). . . . . 1-8
Hudock v. Virginia State Bar, 233 Va. 390, 355 S.E.2d 601, 355 S.E.2d 390 (1987). . . . . 42-20
Hudson v. Commonwealth, 266 Va. 371, 585 S.E.2d 583 . . . . . 38-11
Hudson v. Lanier, 255 Va. 330, 497 S.E.2d 471 (1998). . . . . 41-10
Hudson, 266 Va. 371, 585 S.E.2d 583 . . . . . 38-11
Huffman v. Love, 245 Va. 311, 427 S.E.2d 357 (1993) . . . . . 9-34; 15-8
Hughes v. Cole, 251 Va. 3, 465 S.E.2d 820 . 42-22; 45-113; 45-132
Hughes v. Doe, 273 Va. 45, 639 S.E.2d 302 (2007) . 8-8
Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973). . . . . 4-30; 9-7; 33-2; 33-4, 33-5; 33-8
Humble Oil & Ref. Co. v. Cox, 207 Va. 197, 148 S.E.2d 756 . . . . . 45-34
Humphreys v. Baird, 197 Va. 667, 90 S.E.2d 796 (1956) . . . . . 39-6
Hundley v. Osborne, 256 Va. 173, 500 S.E.2d 810 (1998). . . . . 9-7

[References are to pages]

Hunter v. Burroughs, 123 Va. 113, 96 S.E. 360 (1918). . . . . .35-20
Hunter v. Hollingsworth, 165 Va. 583, 183 S.E. 508 (1936). . . . . .45-62
Hutchinson v. Proxmire, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979) . . . . . .37-3
Hutchison v. King, 206 Va. 619, 145 S.E.2d 216 (1965). . . . . .45-62
Hyland v. Raytheon Tech. Servs. Co., 277 Va. 40, 670 S.E.2d 746 (2009) . . . . . .37-22; 37-27
Hyundai Motor Co. v. Duncan, 289 Va. 147, 766 S.E.2d 893 (2015). . . . . .2-16; 34-20

## I

Ideal Steam Laundry v. Williams, 153 Va. 176, 149 S.E. 479 (1929) . . . . . 8-2
In re Phillips, 296 Va. 433, 822 S.E.2d 1 . . . . . 40-22
Indian Acres of Thornburg, Inc. v. Denion, 215 Va. 847, 213 S.E.2d 797 (1975). . . . . .23-14
Infant C., 239 Va. 572, 391 S.E.2d 322. .4-22; 4-26; 4-30; 11-6, 11-7; 24-24
Ingle v. Clinchfield R. Co., 169 Va. 131, 192 S.E. 782 (1937) . . . . . .23-6
Ingles v. Dively, 246 Va. 244, 435 S.E.2d 641 (1993). . . . . .37-58
Interim Pers. of Cent. Va., Inc. v. Messer, 559 S.E.2d 704, 263 Va. 435 (2002) . . . . . .4-6; 4-14; 5-5
Interstate Veneer Co. v. Edwards, 191 Va. 107, 60 S.E.2d 4 (1950). . . . . .10-34; 10-44; 10-54
Irvan v. Jamison Oil Co., 205 Va. 1, 135 S.E.2d 153 (1964). . . . . .10-96; 10-98
Irving v. Divito, 294 Va. 465, 807 S.E.2d 741 (2017). . . . . .48-14, 48-15; 48-18
Isbell v. Commercial Inv. Assocs., 273 Va. 605, 644 S.E.2d 72 (2007) . . . . . 24-2; 24-6; 24-14
Isle of Wight County v. Nogiec, 281 Va. 140, 704 S.E.2d 83 (2011) . . . . . 9-12; 37-33; 45-110; 45-116
Ives v. Redford, 219 Va. 838, 252 S.E.2d 315 (1979) . . . . . 35-9; 35-12

## J

J.&C., Inc. v. Combined Communs. Corp. of Kentucky, 1987 Ky. App. LEXIS 620 . . . . . .37-6
J.B. Colt Co. v. Elam, 138 Va. 124, 120 S.E. 857 (1924). . . . . .45-34
J.B. Moore Elec. Contractor, Inc. v. Westinghouse Elec. Supply Co., 221 Va. 745, 273 S.E.2d 553 (1981).45-26
J.E. Robert Co. v. J. Robert Co., 231 Va. 338, 343 S.E.2d 350 . . . . . 39-14; 45-106
J.M. Turner & Co. v. Delaney, 211 Va. 168, 176 S.E.2d 422 . . . . . .45-62
Jackovach v. Yocom, 212 Iowa 914, 237 N.W. 444 (Iowa 1931). . . . . .35-36
Jackson v. Commonwealth, 266 Va. 423, 587 S.E.2d 532 (2003). . . . . .49-14
Jackson v. Hartig, 274 Va. 219, 645 S.E.2d 303 (2007). . . . . .9-33; 37-3
Jackson v. Jackson, 96 Va. 165, 31 S.E. 78 . . . . .45-56
Jackson v. Qureshi, 277 Va. 114, 671 S.E.2d 163 (2009) . . . . . .35-3; 35-9; 35-12
Jackson's Adm'r v. Jackson, 96 Va. 165, 31 S.E. 78 (1898). . . . . .45-56
Jacobs v. Jacobs, 218 Va. 264, 237 S.E.2d 124 (1977). . . . . .45-104
Jacobson v. Kirn, 192 Va. 352, 64 S.E.2d 755 (1951).8-24
Jacobson v. Rochester Communications Corp., 410 N.W.2d 830 (Minn. 1987). . . . . .37-3
Jae-Woo Cha v. Korean Presbyterian Church, 262 Va. 604, 553 S.E.2d 511. . . . . .37-33
James v. City of Norfolk, 206 Va. 35, 141 S.E.2d 748. . . . . .10-88; 10-92; 10-96; 10-98; 10-102
James v. Commonwealth, 254 Va. 95, 487 S.E.2d 205 (1997) . . . . . .2-10
James v. Gannett Co., 353 N.E.2d 834, 40 N.Y.2d 415, 386 N.Y.S.2d 871 (N.Y. 1976) . . . . . .37-3
James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980).11-2; 31-5
James v. Norfolk, 206 Va. 35, 141 S.E.2d 748 (1965) . . . . . .10-88; 10-92; 10-96; 10-98; 10-102
James v. Powell, 154 Va. 96, 152 S.E. 539. .37-10; 37-53; 37-66
James, 221 Va. 43, 282 S.E.2d 864 . . . . . .31-6
James G. Davis Constr. Corp. v. FTJ, Inc., 298 Va. 582, 841 S.E.2d 642 (2020) . . . . . .45-113
Jamison v. Richardson, 198 Va. 190, 93 S.E.2d 140 (1956) . . . . . .13-6
Jarvis v. Tonkin, 238 Va. 115, 380 S.E.2d 900. . .39-2; 48-34
Jarvis v. Wallace, 139 Va. 171, 123 S.E. 374 ((1924)). . . . . .28-14
Jean Moreau & Assocs., 283 Va. 128, 720 S.E.2d 105 . . . . . .31-5; 45-132
Jefferson Hospital, Inc. v. Van Lear, 186 Va. 74, 41 S.E.2d 441 (1947). . . . . .5-11
Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E.2d 198 (1943) . . . . . 39-3; 45-106
Jeffress v. Virginia Ry. & Power Co., 127 Va. 694, 104 S.E. 393 (1920). . . . . .1-2
Jeld-Wen, Inc. v. Gamble, 256 Va. 144, 501 S.E.2d 393 (1998). . . . . .34-26; 34-36; 34-44; 34-62
Jenkins v. County of Shenandoah, 246 Va. 467, 436 S.E.2d 607 (1993). . . . . .46-2

[References are to pages]

Jenkins v. Payne, 251 Va. 122, 465 S.E.2d 795 (1996). . . . . .5-4; 5-10
Jenkins v. Pyles, 269 Va. 383, 611 S.E.2d 404 (2005) . . . . . .6-4; 9-7
Jenkins v. Trice, 152 Va. 411, 147 S.E.2d 251. .45-100; 48-20, 48-21; 48-34
Jenoff v. Hearst Corp., 453 F. Supp. 541 (D. Md. 1978). . . . . .37-3
Jessup v. Jessup, 221 Va. 61, 267 S.E.2d 115 (1980). . . . . .48-24
Jewel v. Commonwealth, 260 Va. 430, 536 S.E.2d 905 (2000) . . . . . .2-38, 2-39
John Aragona Enterprises, Inc. v. Miller, 213 Va. 298, 191 S.E.2d 804 (1972). . . . . .24-6
John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007). . . . . .9-8
John F. Ivory Storage Co. v. Atlantic Coast Line R.R., 187 Va. 857, 48 S.E.2d 242 . . . . . .18-8; 18-44
John Grier Constr. Co. v. Jones Welding & Repair, Inc., 238 Va. 270, 383 S.E.2d 719 (1989). . . . . .44-8
John Hancock Mut. Life Ins. Co. v. Virginia Nat'l Bank, 212 Va. 31, 181 S.E.2d 618 (1971). . . . . .47-48
Johnson v. Campbell, 258 Va. 453, 521 S.E.2d 764 (1999). . . . . .5-6
Johnson v. Capital City Press, 346 So. 2d 819 . . . 37-3
Johnson v. Cauley, 262 Va. 40, 546 S.E.2d 681 (2001). . . . . .48-28
Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979). . . . . .1-9
Johnson v. First Union Nat'l Bank, 271 Va. 239, 624 S.E.2d 10. . . . . .44-10
Johnson v. Haas, 224 Va. 245, 195 S.E.2d 789 (1982). . . . . .10-41
Johnson v. Harrison, 161 Va. 804, 172 S.E. 259 (1934). . . . . .10-92
Johnson v. Hart, 279 Va. 617, 692 S.E.2d 239 (2010). . . . . .42-11
Johnson v. Hugo's Skateway, 974 F.2d 1408 . . . . 9-35
Johnson v. Insurance Co. of N. America, 232 Va. 340, 350 S.E.2d 616 . . . . . .47-76
Johnson v. J.S. Bell, Jr. & Co., 202 Va. 274, 117 S.E.2d 85, 117 S.E.2d 274 (1960). . . . . .23-30
Johnson v. Kellam, 162 Va. 757, 175 S.E. 634 (1934) . . . . . .9-14; 10-52
Johnson v. Marcel, 251 Va. 58, 465 S.E.2d 815 (1996) . . . . . .27-6; 33-14
Johnson v. Raviotta, 264 Va. 27, 563 S.E.2d 727 (2002) . . . . . .2-54
Johnson v. Smith, 241 Va. 396, 403 S.E.2d 685 (1991) . . . . . .9-40
Johnson v. Wilmoth, 209 Va. 82, 161 S.E.2d 682 (1968). . . . . .10-18
Johnson v. Windsor Ins. Co., 268 Va. 196, 597 S.E.2d 31 . . . . . .16-2; 47-28
Johnson, 137 Va. 12, 119 S.E. 253. . . . . .46-20
Johnson, 262 Va. 40, 546 S.E.2d 681 . . . . . .48-28
Johnson, 264 Va. 27, 563 S.E.2d 727 . . . . . .2-54
Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1978 OK 88 (Okla. 1978). . . . . .37-3
Johnston v. First Union Nat'l Bank, 271 Va. 239, 624 S.E.2d 10 (2006) . . . . . .44-8; 44-10
Johnston v. Moorman, 80 Va. 131 (1885). . . . . .38-6
Jones v. Aluminum Window & Door Corp., 110 S.E.2d 531, 201 Va. 283 (1959) . . . . . .17-4
Jones v. City of Richmond, 118 Va. 612, 88 S.E. 82 (1916) . . . . . .32-3
Jones v. Ford Motor Co., 263 Va. 237, 559 S.E.2d 592 (2002) . . . . . .7-4; 34-36; 34-38; 34-46; 34-58
Jones v. Massie, 158 Va. 121, 163 S.E. 63 ((1932)) .28-10
Jones v. Pasco, 179 Va. 7, 18 S.E.2d 258 (1942) . 10-30
Jones, 263 Va. 237, 559 S.E.2d 592 . . . . . .7-5
Jordan v. Jordan, 220 Va. 160, 257 S.E.2d 761 (1979) . . . . . .4-12; 10-18
Jordan v. Kollman, 269 Va. 569, 612 S.E.2d 203 (2005). .37-2; 37-7; 37-10; 37-13; 37-18; 37-22; 37-27
Jordan v. Sauve, 219 Va. 448, 247 S.E.2d 739. . .39-2; 39-19; 39-38
Jordan v. Shands, 255 Va. 492, 500 S.E.2d 215 (1998). . . . . .37-14; 38-6; 38-24
Jordan v. Taylor, 209 Va. 43, 161 S.E.2d 790 (1968) . 2-42
Joseph v. Commonwealth, 249 Va. 78, 452 S.E.2d 862 (1995) . . . . . .2-58
Judicial Inquiry & Review Comm'n v. Waymack, 284 Va. 527, 745 S.E.2d 410 ((2012)). . . . . .3-14
Judicial Inquiry and Review Comm'n v. Lewis, 264 Va. 401, 568 S.E.2d 687 (2002). . . . . .3-14
Juniper v. Commonwealth, 271 Va. 362, 626 S.E.2d 383 (2006). . . . . .1-8
Juniper Lumber Co. v. John M. Nelson, Inc., 112 S.E. 564, 133 Va. 146 (1922). . . . . .45-92
Jury v. Giant of Maryland, 254 Va. 235, 491 S.E.2d 718 (1997) . 33-10; 36-2; 36-7; 37-12; 37-36; 38-2; 38-8; 38-18; 41-18; 41-26; 41-28
J-W Enterprises, Inc., 279 Va. 711, 691 S.E.2d 769 . 31-6

[References are to pages]

## K


K&W Builders, Inc. v. Merchants and Business Men's Mut. Ins. Co., 255 Va. 5, 495 S.E.2d 473 . . . . 47-4

Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 706 S.E.2d 864 (2011) . . . . 4-2; 4-6; 4-30; 10-3; 34-56

Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514 (1983). . . . . .9-34; 42-4; 45-4

Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) . . . . . .49-2

Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) . . . . . 49-16

Karim v. Grover, 235 Va. 550, 369 S.E.2d 185 (1988) . . . . . 6-16

Kasco Mills, Inc. v. Ferebee, 197 Va. 589, 90 S.E.2d 866 (1956). . . . . .44-10

Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989).37-3

Kavanaugh v. Donovan, 186 Va. 85, 41 S.E.2d 489 (1947). . . . . .24-22; 24-24

Kay Adv. Co. v. Olde London Transp. Co., 216 Va. 273, 217 S.E.2d 876 . . . . . .45-112

Kay Management Co. v. Creason, 220 Va. 820, 263 S.E.2d 394 (1980). . . . . .8-26; 14-4; 14-12

K-B Corp. v. Gallagher, 218 Va. 381, 237 S.E.2d 183 ((1977)) . . . . . 28-4

Kearns v. Hall, 197 Va. 736, 91 S.E.2d 648 (1956).2-26

Keffer v. Grayson, 76 Va. 517 (1882) . . . 45-38; 45-40

Keith v. Lulofs, 283 Va. 768, 724 S.E.2d 695 (2012).2-54

Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960). . . . . .31-5, 31-6

Keller v. Denny, 232 Va. 512, 352 S.E.2d 327 (1987) . . . . . 42-9

Kellermann v. McDonough, 278 Va. 478, 684 S.E.2d 786 (2009) . . . . . 4-7; 5-4, 5-5; 5-10, 5-11; 6-4; 6-16

Kelley v. Henley, 208 Va. 264, 156 S.E.2d 618 (1967). . . . . .10-98

Kelly v. R.S. Jones & Assocs., 242 Va. 79, 406 S.E.2d 34 . . . . . 44-2; 44-10

Kelly v. Va. Elec. & Power Co., 238 Va. 32, 381 S.E.2d 219. . . . . .6-16

Kennedy v. Annandale Boys Club, Inc., 221 Va. 504, 272 S.E.2d 38 (1980). . . . . .45-12

Kennedy v. McElroy, 195 Va. 1078, 81 S.E.2d 436 (1954) . . . . . 4-22

Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (N.C. 1956) . . . . . .35-36

Kensington Associates v. West, 234 Va. 430, 362 S.E.2d 900 (1987) . . . . . 8-14; 8-16

Kern v. J.L. Barksdale Furniture Corp., 224 Va. 682, 299 S.E.2d 365 (1983) . . . . . .47-16

Kesler v. Allen, 233 Va. 130, 353 S.E.2d 777 (1987). 8-30; 24-14; 24-18

Khadim v. Lab. Corp. of Am., 838 F. Supp. 2d 448 (W.D. Va. 2011) . . . . . 35-2

Kidd v. De Witt, 128 Va. 438, 105 S.E. 124 (1920). .8-20

Kidd v. Gunter, 262 Va. 442, 551 S.E.2d 646 (2001). . . . . .48-10; 48-15

Kiddell v. Labowitz, 284 Va. 611, 733 S.E.2d 622 (2012). . . . . .27-12; 48-20, 48-21; 48-38, 48-39

Kilby v. Pickurel, 240 Va. 271, 396 S.E.2d 666. .42-18

Kim v. Seung Chong, 294 Va. 433, 807 S.E.2d 216 (2017). . . . . .48-34, 48-35

Kimberlin v. PM Transp., Inc., 264 Va. 261, 563 S.E.2d 665 (2002). . . . . .10-3; 10-8; 10-34; 10-114

Kimble v. Carey, 279 Va. 652, 691 S.E.2d 790 (2010). . . . . .6-2; 6-4, 6-5; 6-16; 6-26; 7-12; 14-4

King v. Commonwealth, 2 Va. App. 708, 347 S.E.2d 530 (1986). . . . . .1-8

King v. Eccles, 209 Va. 726, 167 S.E.2d 349 (1969).10-92

King v. Hartung, 123 Va. 185, 96 S.E. 202 (1918). 8-30

King v. Martin, 150 Va. 122, 142 S.E. 358 (1928). 41-8

Kingrey v. Hill, 245 Va. 76, 425 S.E.2d 798 (1993).7-2; 7-10

Kings Markets, Inc. v. Yeatts, 226 Va. 174, 307 S.E.2d 249 (1983). . . . . .6-26, 6-27; 23-30; 24-11; 24-20

Kingsland Land Corp. v. Lange, 191 Va. 256, 60 S.E.2d 872 (1950). . . . . .43-4, 43-5

Kinsey v. Brugh, 157 Va. 407, 161 S.E. 41 (1931). 17-2

Kipps v. Va. Natural Gas, Inc., 247 Va. 162, 441 S.E.2d 4 . . . . . .46-10

Kirby v. Moehlman, 182 Va. 876, 30 S.E.2d 548 (1944) . . . . . .25-6

Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 194 S.E. 727 (1938) . . . . . 45-36; 45-62; 45-110

Kitchen v. City of Newport News, 275 Va. 378, 657 S.E.2d 132 (2008). . . . . .46-2

Kitchen v. Throckmorton, 223 Va. 164, 286 S.E.2d 673 . . . . . .39-10; 39-18

Klaiber v. Freemason Assocs., 266 Va. 478, 587 S.E.2d 555 . . . . . 39-3; 39-7; 40-3; 40-22; 40-24

Klarfeld v. Salsbury, 233 Va. 277, 355 S.E.2d 319 (1987). . . . . .35-26

Klingbeil Management Group Co. v. Vito, 233 Va. 445, 357 S.E.2d 200 (1987). . . . . .24-10

Knight v. Moore, 179 Va. 139, 18 S.E.2d 266 (1942). . . . . .23-12; 23-28

Knodel v. Dickerman, 246 Va. 124, 431 S.E.2d 323 (1993) . . . . . 9-41

Koffman, 265 Va. 12, 574 S.E.2d 258. 4-22; 11-6; 36-6; 36-10; 36-26; 36-28; 36-30; 36-32

[References are to pages]

Kondaurov v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006). . . . . .9-7; 33-5
Kornegay v. City of Richmond, 185 Va. 1013, 41 S.E.2d 45. . . . . .46-36
Korzendorfer Realty, Inc. v. Hawkes, 178 S.E.2d 524, 211 Va. 534 (1971). . . . . .43-10
Koutsounadis v. England, 238 Va. 128, 380 S.E.2d 644 (1989). . . . . .5-10
Krikorian v. Dailey, 171 Va. 16, 197 S.E. 442 (1938). . . . . .45-112
Kroger Co. v. Appalachian Power Co., 244 Va. 560, 422 S.E.2d 757 (1992). . . . . .30-10
Krueger v. Austad, 545 N.W.2d 205, 1996 SD 26 (S.D. 1996). . . . . .37-3
Kuczmanski v. Gill, 225 Va. 367, 302 S.E.2d 48 . 39-24
Kuga v. Chang, 241 Va. 179, 399 S.E.2d 816 (1991). . . . . .43-4, 43-5
Kurpiel v. Hicks, 284 Va. 347, 731 S.E.2d 921 (2012). . . . . .27-2; 27-6

## L

La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC, 294 Va. 243, 805 S.E.2d 399 (2017). . .40-16, 40-17; 40-20
Lake Motel, Inc. v. Lowery, 224 Va. 553, 299 S.E.2d 496 (1983). . . . . .45-5
Lamar Corp. v. Commonwealth Transp. Comm'r of Virginia, 262 Va. 375, 552 S.E.2d 61 . .46-8; 46-18; 46-20
Lambert v. Downtown Garage, Inc., 262 Va. 707, 553 S.E.2d 714 (2001). . . . . .39-28
Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 798 S.E.2d 177 (2017). . . . . .42-20
Landcraft Co. v. Kincaid, 263 S.E.2d 419, 220 Va. 865 (1980). . . . . .8-40
Landeck v. Commonwealth, 59 Va. App. 744, 722 S.E.2d 643 (2012). . . . . .1-10
Landes v. Arehart, 212 Va. 200, 183 S.E.2d 127 (1971). . . . . .6-26
Landmark Communications, Inc. v. Macione, 230 Va. 137, 334 S.E.2d 587 (1985). . . . . .37-7
Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 671 S.E.2d 143 (2009). . . . . .24-11; 24-14; 24-18
Lane v. Commonwealth, 190 Va. 58, 55 S.E.2d 450 (1949). . . . . .36-18
Langhorne Rd. Apartments, Inc. v. Bisson, 207 Va. 474, 150 S.E.2d 540. . . . . .23-30; 24-20
Langman v. Alumni Ass'n, 247 Va. 491, 442 S.E.2d 669 . . . . . .45-106
Lanier v. Johnson, 190 Va. 1, 55 S.E.2d 442 (1949). 10-66
Larimore v. Blaylock, 259 Va. 568, 528 S.E.2d 119 (2000). . . . . .37-11; 37-32, 37-33
Lassiter v. Warinner, 235 Va. 274, 368 S.E.2d 258 (1988). . . . . .7-12, 7-13
Laughlin v. Rose, 200 Va. 127, 104 S.E.2d 782 (1958). . . . . .7-10
Laughon & Johnson, Inc. v. Burch, 222 Va. 200, 278 S.E.2d 856, 278 S.E.2d 200 (1981). . . . . .30-6
Lavenstein Bros. v. Hartford Fire Ins. Co., 125 Va. 191, 101 S.E. 331. . . . . .47-54
Lawrence v. Commonwealth, 279 Va. 490, 689 S.E.2d 748 (2010). . . . . .49-16
Lawrence v. Wirth, 226 Va. 408, 309 S.E.2d 315 (1983). . . . . .9-18; 35-5; 35-42
Lawson v. Commonwealth, 13 Va. App. 109, 409 S.E.2d 466 (1991) . . . . . .1-9
Lawson v. John Doe, 239 Va. 477, 391 S.E.2d 333 (1990). . . . . .4-12; 17-20
Layne-Atlantic Co. v. Koppers Co., 214 Va. 467, 201 S.E.2d 609 (1974). . . . . .34-16; 34-18; 34-36
Leake v. Meredith, 221 Va. 14, 267 S.E.2d 93 . . . 34-4
Lee v. City of Norfolk, 281 Va. 423, 706 S.E.2d 330 (2011). . . . . .26-14
Lee v. Moore, 168 Va. 278, 191 S.E. 589 (1937) . 10-30
Lee v. Southland Corp., 219 Va. 23, 244 S.E.2d 756 (1978). . . . . .41-10; 41-32
Lehigh Portland Cement Co. v. Virginia S.S. Co., 132 Va. 257, 111 S.E. 104 (1922). . . . . .45-110
Leicht-Benson Corp. v. Stone & Co., 138 Va. 511, 121 S.E. 883. . . . . .43-5
Lendvay v. Sobrito, 211 Va. 548, 178 S.E.2d 532 (1971). . . . . .7-5
Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988). 31-6
Leonard v. Vaughan & Co., 117 Va. 514, 85 S.E. 471 (1915). . . . . .43-4
Lerwill v. Regent Van & Storage, Inc., 217 Va. 490, 229 S.E.2d 880 (1976). . . . . .10-104; 10-108
Leslie v. Nitz, 212 Va. 480, 184 S.E.2d 755 (1971) . 15-14
Levenson v. Commonwealth, 68 Va. App. 255, 808 S.E.2d 196 (2017). . . . . .5-4, 5-5; 5-10
Levy v. Paul, 207 Va. 100, 147 S.E.2d 722 (1966). .34-32
Lewis v. Carpenter Co., 252 Va. 296, 477 S.E.2d 492 (1996). . . . . .7-24; 34-2
Lewis v. Commonwealth, 8 Va. App. 574, 383 S.E.2d 736 (1989). . . . . .1-9
Lewis v. Commonwealth, 211 Va. 80, 175 S.E.2d 236 (1970). . . . . .1-9
Lewis v. Kei, 281 Va. 715, 708 S.E.2d 884.37-52; 38-6; 38-8; 38-10; 41-2; 41-6; 41-14; 41-24
Lewis v. Oliver, 873 P.2d 668, 178 Ariz. 330 (Ariz. Ct. App. 1993). . . . . .37-3

[References are to pages]

Lewis-Gale Med. Ctr., LLC v. Alldredge, 282 Va. 141, 710 S.E.2d 716 (2011) . . . 40-6; 40-8; 40-10; 40-14
Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 288 S.E.2d 469 (1982) . . . . . 47-56
Lienau v. Commonwealth, 69 Va. App. 254, 818 S.E.2d 58 (2018) . . . . . .36-14
Life & Cas. Ins. Co. v. Daniel, 209 Va. 332, 163 S.E.2d 577 . . . . . .47-68; 47-92
Light v. City of Danville, 168 Va. 181, 190 S.E. 276. . . . . .31-2
Limberg v. Lent, 206 Va. 425, 143 S.E.2d 872 (1965). . . . . .23-18
Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976) . . . . . 2-38
Lindeman v. Lesnick, 268 Va. 532, 604 S.E.2d 55 (2004). . . . . .37-12; 37-32
Lindsay v. McEnearney Assocs., 260 Va. 48, 531 S.E.2d 573 (2000). . . . . .44-6
Linhart v. Lawson, 261 Va. 30, 540 S.E.2d 875 (2001) . . . . . 12-2; 31-4
Link v. Weizenbaum, 229 Va. 201, 326 S.E.2d 667 . 45-83
Link Associates v. Jefferson Standard Life Ins. Co., 291 S.E.2d 212, 223 Va. 479 (1982). . . . . .39-18; 39-22
Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582, 61 L.R.R.M. (BNA) 2345 . . . . . 37-14
Lipscomb v. O'Brien, 181 Va. 471, 25 S.E.2d 261 (1943). . . . . .10-30
Litchford v. Hancock, 232 Va. 496, 352 S.E.2d 335 (1987) . . . . . 10-8; 10-16
Little v. Cross, 217 Va. 71, 225 S.E.2d 387 (1976) . 35-22
Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 10 S.E.2d 518. . . . . .47-45
Livingston v. Va. DOT, 284 Va. 140, 726 S.E.2d 264 (2012). . . . . .46-10; 46-24
LLC v. Lynch, 280 Va. 166, 695 S.E.2d 537 (2010) . 23-6; 39-6; 39-11; 40-16; 40-20; 45-106
Llewellyn v. White, 297 Va. 588, 831 S.E.2d 494 (2019). . . . . .4-6; 44-3
Lloyd v. Kime, 275 Va. 98, 654 S.E.2d 563 (2008) . 35-22
Lloyd v. Smith, 142 S.E. 363, 150 Va. 132 (1928). .39-10, 39-11
LLP, 290 Va. 36, 772 S.E.2d 290. . . . . .45-56
Lochaven Co. v. Master Pools by Schertle, Inc., 233 Va. 537, 357 S.E.2d 534 (1987) . . . . . 45-112
Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 524 S.E. 2d 420 (2000). . . . . .37-12; 45-112
Logan v. Montgomery Ward & Co., 216 Va. 425, 219 S.E.2d 685 (1975). . . . . .7-24; 34-20; 34-26
Lohman v. Sherwood, 181 Va. 594, 26 S.E.2d 74 (1943). . . . . .45-44
Long v. Abbruzzetti, 254 Va. 122, 487 S.E.2d 217. .45-120
Long v. Harrison, 134 Va. 424, 114 S.E. 656 (1922).45-36
Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941).46-8; 46-10; 46-14; 46-24; 46-32
Long & Foster Real Estate, Inc. v. Clay, 231 Va. 170, 343 S.E.2d 297 . . . . . 43-22; 43-24
Long Signature Homes v. Fairfield Woods, 248 Va. 95, 445 S.E.2d 489 (1994). . . . . .45-96
Looney v. Belcher, 169 Va. 160, 192 S.E. 891 (1937). . . . . .45-36
Lopez v. Dobson, 240 Va. 421, 397 S.E.2d 863. .10-88
Lord v. State Farm Mut. Auto. Ins. Co., 224 Va. 283, 295 S.E.2d 796 (1982) . . . . . 47-56, 47-57
Lostrangio v. Laingford, 261 Va. 495, 544 S.E.2d 357 (2001) . . . . . .31-3
Love v. Schmidt, 239 Va. 357, 389 S.E.2d 707 . . 8-30; 24-10; 24-14; 24-18
Loving v. Hayden, 245 Va. 441, 429 S.E.2d 8. . .10-18
Low Moor Iron Co. v. Jackson, 117 Va. 76, 84 S.E. 100 (1915) . . . . . 2-10; 43-4; 43-20
Lowe v. Trundle, 78 Va. 65 (1883). . . . . .39-34
Ltd., 237 Va. 277, 377 S.E.2d 589. . . . . .8-28
Lubowiecki v. Donnell, 235 Va. 131, 366 S.E.2d 90 (1988). . . . . .14-16
Lucas v. Craft, 161 Va. 228, 170 S.E. 836 (1933).14-12
Lucas v. Riverhill Poultry, Inc., 860 S.E.2d 361, 300 Va. 78 (2021) . . . . . 4-12; 10-18
Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954). . . . . .45-28; 45-44
Ludwig v. Commonwealth, 52 Va. App. 1, 660 S.E.2d 679 (2008). . . . . .1-10
Luedtke v. Phillips, 190 Va. 207, 56 S.E.2d 80 (1949). . . . . .24-14; 24-18
Luhring v. Carter, 193 Va. 529, 69 S.E.2d 416 . . 37-32
Lumbermen's Underwriting Alliance v. Dave's Cabinet, Inc., 258 Va. 377, 520 S.E.2d 362 (1999) . . . 39-10
Lumbermens Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 287 F. Supp. 932 . . . . . 47-44; 47-56
Lumbermens Mut. Casualty Co. v. Harleysville Mut. Casualty Co., 406 F.2d 836 (4th Cir. 1969). . .47-56
Lumbermens Mutual Casualty Co. v. Harleysville Mutual Casualty Co., 287 F. Supp. 932. . . . . .47-56
Lunsford's Administrator v. Colonial Coal & Coke Co., 79 S.E. 348, 115 Va. 346 (1913). . . . . 23-8; 23-26
Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 457 S.E.2d 28. .6-2; 42-4; 42-9, 42-10; 44-14

[References are to pages]

Lynch v. Commonwealth, 131 Va. 762, 109 S.E. 427 (1921) . . . . . 36-6; 36-26; 36-30
Lynchburg Gas Co. v. Sale, 160 Va. 783, 169 S.E. 577 (1933) . . . . . 30-8; 30-10; 30-12
Lyons v. Grether, 218 Va. 630, 239 S.E.2d 103 (1977) . . . . . 35-16; 35-18

## M

M.W. Worley Constr. Co. v. Hungerford, Inc., 215 Va. 377, 210 S.E.2d 161 (1974) . . . . . 30-6
Macaulay v. Home Beneficial Life Ins. Co., 235 Va. 649, 369 S.E.2d 420 (1988) . . . . . 47-94
MacDonald v. Firth, 202 Va. 900, 121 S.E.2d 369 (1961) . . . . . 2-48
MacGregor v. Bradshaw, 193 Va. 787, 71 S.E.2d 361 (1952) . . . . . 8-36
MacLellan v. Throckmorton, 235 Va. 341, 367 S.E.2d 720 (1988) . . . . . 42-9
Major v. Hoppe, 209 Va. 193, 163 S.E.2d 164 (1968) . . . . . 13-4
Malbon v. Davis, 40 S.E.2d 183, 185 Va. 748 (1946) . . . . . 39-30
Management Enterprises, Inc. v. Thorncroft Co., 243 Va. 469, 416 S.E.2d 229 (1992) . . . . . 39-22
Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 732 S.E.2d 690 . . . . . 9-12
Mangus v. Doe, 203 Va. 518, 125 S.E.2d 166 (1962) . . . . . 16-6
Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950) . . . . . 35-50; 45-112
Mann v. Hinton, 249 Va. 555, 457 S.E.2d 22 (1995) . 9-40; 10-62
Mann v. Norfolk & W. R. Co., 199 Va. 604, 101 S.E.2d 535 (1958) . . . . . 18-12
Mansfield v. Bernabei, 284 Va. 116, 727 S.E.2d 69 (2012) . . . . . 37-12
Manss-Owens Co. v. H.S. Owens & Son, 129 Va. 183, 105 S.E. 543 . . . . . 45-46
Manuel v. Cassada, 59 S.E.2d 47, 190 Va. 906 (1950) . . . . . 38-6
Marefield Meadows, Inc. v. Lorenz, 245 Va. 255, 427 S.E.2d 363 (1993) . . . . . 45-28
Marine Dev. Corp. v. Rodak, 225 Va. 137, 300 S.E.2d 763 . . . . . 45-56; 45-132
Marks v. Bryant, 14 Va. 91 (1809) . . . . . 48-21
Maroulis v. Elliott, 207 Va. 503, 151 S.E.2d 339 (1966) . . . . . 4-16; 10-12; 10-18
Marshall v. Goughnour, 221 Va. 265, 269 S.E.2d 801 (1980) . . . . . 9-40
Marshall Erdman & Assocs. v. Loehr, 24 Va. App. 670, 485 S.E.2d 145 . . . . . 47-18
Martin v. Basham, 216 Va. 914, 223 S.E.2d 899 (1976) . . . . . 45-22
Martin v. Lahti, 295 Va. 77, 809 S.E.2d 644 (2018) . 35-28; 35-32
Martin v. Moore, 263 Va. 640, 561 S.E.2d 672 ((2002)) . . . . . 26-6, 26-7
Martin v. Phillips, 235 Va. 523, 369 S.E.2d 397 (1988) . . . . . 39-2; 48-35
Martin & Martin, Inc. v. Bradley Enters., 256 Va. 288, 504 S.E.2d 849 . . . . . 45-70
Martin Bros., 277 Va. 586, 675 S.E.2d 183 . . . . . 45-125
Mary Washington Hosp., Inc. v. Gibson, 228 Va. 95, 319 S.E.2d 741 . . . . . 23-30
Maryland Casualty Co. v. Cole, 156 Va. 707, 158 S.E. 873 (1931) . . . . . 47-60; 47-74
Maryland Casualty Co. v. Craig, 213 Va. 660, 194 S.E.2d 729 (1973) . . . . . 47-18; 47-50
Masche v. Nichols, 188 Va. 857, 51 S.E.2d 144 (1949) . . . . . 39-16
Mason v. Chappell, 56 Va. 572 . . . . . 45-106
Mason & Dixon Lines, Inc. v. United States Cas. Co., 199 Va. 221, 98 S.E.2d 702 . . . . . 47-56
Massenburg v. City of Petersburg, 298 Va. 212, 836 S.E.2d 391 (2019) . . . . . 31-2; 31-5
Massey v. Jones, 182 Va. 200, 28 S.E.2d 623 (1944) . . . . . 37-12
Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922) . . . . . 2-2; 2-20
Massie v. Parrish, 140 Va. 717, 125 S.E. 691 (1924) . . . . . 45-8
Master Auto Serv. Corp. v. Bowden, 179 Va. 507, 19 S.E.2d 679 (1942) . . . . . 8-10
Masters v. Cardi, 186 Va. 261, 42 S.E.2d 203 (1947) . . . . . 10-28
Mastin v. Theirjung, 238 Va. 434, 384 S.E.2d 86 (1989) . . . . . 9-7
Matthews v. Commonwealth, Dept. of Transp., 253 Va. 180, 482 S.E.2d 810 . . . . . 6-2; 6-18
Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955) . . . . . 9-40; 10-18
Matthews v. LaPrade, 144 Va. 795, 130 S.E. 788 (1925) . . . . . 3-12; 36-22; 36-24; 45-110; 45-113
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) . . . . . 9-35, 9-36
Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931) . . . . . 45-36
Maxey v. Doe, 217 Va. 22, 225 S.E.2d 359 (1976) . 47-48
Maxie v. Doe, 215 Va. 409, 211 S.E.2d 246 (1975) . 10-34
Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co., 493 S.E.2d 375, 254 Va. 408 . . . . . 40-2; 40-10; 40-14
Maxwell v. McCaffrey, 219 Va. 909, 252 S.E.2d 342 (1979) . . . . . 35-9; 35-12
May v. Caruso, 264 Va. 358, 568 S.E.2d 690 . . . . 2-16

[References are to pages]

May v. Malcolm, 202 Va. 78, 116 S.E.2d 114 (1960). . . . . .46-32
May v. Martin, 205 Va. 397, 137 S.E.2d 860 (1964).45-86
Mayr v. Osborne, 293 Va. 74, 795 S.E.2d 731 (2017). . . . . .35-3; 35-28; 35-32; 36-6
McBride v. Bennett, 288 Va. 450, 764 S.E.2d 44 (2014). . . . . .11-2; 31-5
McBride v. McBride, 67 Va. 476 (1875). . . . . .48-18
McBride, 564 U.S. 685, 131 S. Ct. 2630, 180 L. Ed. 2d 637. . . . . .21-6; 21-11
McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953). . . .34-46; 34-56; 34-58
McCloud v. Commonwealth, 269 Va. 242, 609 S.E.2d 16 (2005). . . . . .49-6
McCormick v. Romans, 214 Va. 144, 198 S.E.2d 651 (1973). . . . . .42-9
McCrorey v. Thomas, 109 Va. 373, 63 S.E. 1011 (1909). . . . . .8-30
McDermott v. Reynolds, 260 Va. 98, 530 S.E.2d 902 (2000). . . . . .33-10, 33-11; 33-14
McDonald v. Hampton Training Sch. for Nurses, 254 Va. 79, 486 S.E.2d 299 (1997). . . . . .8-2; 8-6; 8-28
McFadden v. Garrett, 211 Va. 680, 179 S.E.2d 482 (1971). . . . . .4-12
McHone v. Commonwealth, 57 S.E.2d 109, 190 Va. 435 (1950). . . . . .38-16
McKenzie v. Francis, 214 Va. 104, 197 S.E.2d 221 (1973). . . . . .48-24; 48-28
McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960). . . . . .2-16
McLean v. Piedmont & Arlington Life Ins. Co., 70 Va. 361 (1877). . . . . .47-44
McMillion v. Dryvit Sys., 262 Va. 463, 552 S.E.2d 364 (2001) . . . . . .39-6; 39-10; 39-28; 40-22
McMinn v. Rounds, 267 Va. 277, 591 S.E.2d 694.36-14
McMunn v. Tatum, 237 Va. 558, 379 S.E.2d 908 (1989). . . . . .9-5
McNeill v. Spindler, 191 Va. 685, 62 S.E.2d 13 (1950). . . . . .8-8; 8-14
McNeir v. Greer-Hale Chinchilla Ranch, 74 S.E.2d 165, 194 Va. 623 (1953) . . . . . .34-14
MCR Fed., LLC v. JB&A, Inc., 294 Va. 446, 808 S.E.2d 186 (2017). . . . . .39-6
Md. Cas. Co. v. Craig, 213 Va. 660, 194 S.E.2d 729 . . . . . .47-18; 47-50
Meade v. Meade, 206 Va. 823, 147 S.E.2d 171 (1966). . . . . .6-14; 6-26; 15-12
Meagher v. Johnson, 239 Va. 380, 389 S.E.2d 310.4-22; 11-6; 11-10
Measell v. Baruch, 152 Va. 460, 147 S.E. 203 (1929). . . . . .45-32
Medcom, Inc. v. C. Arthur Weaver Co., Inc., 232 Va. 80, 348 S.E.2d 243 (1986). . . . . .34-16
Medical Center Hospitals v. Sharpless, 229 Va. 496, 331 S.E.2d 405 (1985). . . . . .1-10
Medina v. Hegerberg, 245 Va. 210, 427 S.E.2d 343 (1993). . . . . .10-18
Medlar v. Mohan, 242 Va. 162, 409 S.E.2d 123 (1991). . . . . .10-26; 10-78; 10-80
Meeks v. Hodges, 226 Va. 106, 306 S.E.2d 879 (1983). . . . . .6-20; 10-8; 10-12
Meeropol v. Nizer, 560 F.2d 1061, 195 U.S.P.Q. 273 (2d Cir. 1977) . . . . . .37-3
Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977).37-3
Memco Stores, Inc. v. Yeatman, 232 Va. 50, 348 S.E.2d 228. . . . . .23-16
Memorial Hosp., Inc. v. Oakes, 200 Va. 878, 108 S.E.2d 388. . . . . .35-46
Merchs. Supply Co. v. Hughes, 139 Va. 212, 123 S.E. 355 (1924). . . . . .2-54
Merriman v. Cover, Drayton & Leonard, 104 Va. 428, 51 S.E. 817 . . . . . .45-62
Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984). . . . . .31-5, 31-6
Metro Mach. Corp. v. Mizenko, 244 Va. 78, 419 S.E.2d 632. . . . . .8-26
Metro Realty v. Woolard, 223 Va. 92, 286 S.E.2d 197. . . . . .45-16
Metrocall of Delaware, Inc. v. Continental Cellular Corp., 246 Va. 365, 437 S.E.2d 189 (1993) . . 39-16; 44-12
Metropolitan Life Ins. Co. v. Rutherford, 98 Va. 195, 35 S.E. 361 . . . . . .47-54
Meyer, 150 Va. 656, 143 S.E. 478. . . . . .18-38
Michaelis v. CBS, Inc., 119 F.3d 697 (8th Cir. 1997). . . . . .37-3
Middle Atl. Immig. Co. v. Ardan, 115 Va. 148, 78 S.E. 588. . . . . .43-4, 43-5; 43-20
Mikhaylov v. Sales, 291 Va. 349, 784 S.E.2d 286 (2016) . . . . . .36-7
Miles v. Rose, 162 Va. 572, 175 S.E. 230 (1934). .8-36
Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) . . 37-8; 37-11; 37-52; 37-56; 37-58
Millard v. Cohen, 187 Va. 44, 46 S.E.2d 2 (1948) . 6-24
Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986). . . . . .9-9
Miller v. Newport News, 44 S.E. 712, 101 Va. 432 (1903). . . . . .31-3
Miller v. Query, 201 Va. 193, 110 S.E.2d 198 (1959). 8-38
Miller v. SEVAMP, Inc., 234 Va. 462, 362 S.E.2d 915 (1987). . . . . .45-50

[References are to pages]

Miller v. White, 222 Va. 311, 281 S.E.2d 802 (1981). 2-14
Miller & Meyers v. City of Newport News, 101 Va. 432, 44 S.E. 712 . . . . . 31-3
Mills v. Wells, 204 Va. 173, 129 S.E.2d 705 (1963). 13-4
Millsaps, 232 Va. 502, 352 S.E.2d 311 . . . . . 7-13
Mitchell v. Hughes, 143 Va. 393, 130 S.E. 225 (1925). . . . . .43-22; 43-24
Mize v. Gardner Motor Co., 166 Va. 415, 186 S.E. 108 (1936). . . . . .18-12
Moates v. Hyslop, 253 Va. 45, 480 S.E.2d 109 (1997). . . . . .35-22
Mobley v. Pendleton, 212 Va. 418, 184 S.E.2d 798 (1971). . . . . .10-28
Molchon v. Tyler, 262 Va. 175, 546 S.E.2d 691 (2001). . . . . .5-4
Monahan v. Obici Med. Mgmt. Servs., 271 Va. 621, 628 S.E.2d 330 (2006) . . . . . 9-18; 35-42; 45-128
Moncier v. Green, 182 Va. 127, 27 S.E.2d 921 (1943) . . . . . 8-24
Mongold v. Woods, 278 Va. 196, 677 S.E.2d 288 (2009). . . . . .45-60; 45-132
Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971). . . . . .37-3
Montagna v. Holiday Inns, Inc., 221 Va. 336, 269 S.E.2d 838 (1980). . . . . .44-6; 45-12
Montague v. Allan, 78 Va. 592 . . . . . .48-18
Montgomery Mut. Ins. Co. v. Riddle, 266 Va. 539, 587 S.E.2d 513 (2003). . . . . .47-60
Montgomery Ward, 188 Va. 485, 50 S.E.2d 387. .38-10
Montgomery Ward & Co. v. Nance, 165 Va. 363, 182 S.E. 264 (1935) . . . . . .37-32, 37-33
Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387. . . . . .38-2; 38-6; 38-10
Montgomery Ward & Co. v. Young, 195 Va. 671, 79 S.E.2d 858 (1954) . . . . . 4-6
Moon v. Norvell, 184 Va. 842, 36 S.E.2d 632. . .48-16
Moonlight Enters., LLC v. Mroz, 293 Va. 224, 797 S.E.2d 536 (2017). . . . . .42-9
Moore v. Virginia Transit Co., 188 Va. 493, 50 S.E.2d 268 (1948). . . . . .4-6; 10-104; 10-108
Moore v. Warren, 203 Va. 117, 122 S.E.2d 879 (1961) . . . . . 10-88; 10-92; 10-96; 10-98; 10-102
Moore, 201 Va. 928, 114 S.E.2d 626. . . . . .10-108
Moorhead v. Millin, 542 F. Supp. 614 (D. V.I. 1982). . . . . .37-3
Moorman v. Blackstock, Inc., 276 Va. 64, 661 S.E.2d 404 (2008). . . . . .45-28; 45-54
Morgen Indus. v. Vaughan, 252 Va. 60, 471 S.E.2d 489 (1996). . . . . .34-26; 34-28; 34-54
Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S.E. 850 (1897) . . . . . 45-26
Morris v. Bragg, 155 Va. 912, 156 S.E. 381 (1931). 45-24
Morris v. Dame, 161 Va. 545, 171 S.E. 662 (1933) . 4-3
Morris, 225 Va. 372, 302 S.E.2d 51. .4-22; 28-4; 28-10
Morse v. Commonwealth, 17 Va. App. 627, 440 S.E.2d 145 (1994) . . . . . 1-8
Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 467 S.E.2d 778 . . . . . .39-28
Morton v. Southern Ry. Co., 112 Va. 398, 71 S.E. 561 . . . . . 18-34
Moseley v. Boush, 25 Va. 392. . . . . .45-113
Mosell Realty Corp. v. Schofield, 183 Va. 782, 33 S.E.2d 774 (1945). . . . . .45-4
Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672, 643 S.E.2d 156 . . . . . 6-16; 14-4
Moss v. Harwood, 102 Va. 386, 46 S.E. 385 . . . 37-14; 37-30
Motley v. Regal Ins. Co., 245 Va. 97, 425 S.E.2d 506 (1993). . . . . .47-36
Mountjoy v. Burton, 185 Va. 936, 40 S.E.2d 803 (1947). . . . . .10-26
Moyers v. Gregory, 175 Va. 230, 7 S.E.2d 881 (1940). . . . . .48-10
Mullen v. Brantley, 213 Va. 765, 195 S.E.2d 696 (1973). . . . . .45-112
Mullins v. Coleman, 175 Va. 235, 7 S.E.2d 877 (1940). . . . . .45-100; 48-34
Mullins v. Greer, 226 Va. 587, 311 S.E.2d 110 (1984) . . . . . 27-6
Mullins v. Mingo Lime & Lumber Co., 176 Va. 44, 10 S.E.2d 492 (1940). . . . . .45-8; 45-46; 45-60
Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624 (1949). . . . . .38-16
Mulvey v. Jones, 41 Va. App. 600, 587 S.E.2d 728 (2003) . . . . . 36-7; 36-10; 36-15
Murayama 1997 Trust v. NISC Holdings, LLC, 284 Va. 234, 727 S.E.2d 80. . . . . .44-12
Murphy's Hotel v. Cuddy's Adm'r, 124 Va. 207, 97 S.E. 794 . . . . . 22-4; 25-2
Murray v. Smithson, 187 Va. 759, 48 S.E.2d 239 (1948) . . . . . 4-20
Musselman v. Glass Works, L.L.C., 260 Va. 342, 533 S.E.2d 919 (2000) . . . . . 45-52; 45-63
Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E.2d 724 . . . . . .42-18
Mut. of Omaha Ins. Co. v. Dingus, 219 Va. 706, 250 S.E.2d 352 . . . . . .47-60
Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S.E. 209 (1897). . . . . .47-18; 47-24
Mutual Life Ins. Co. v. Brown, 137 Va. 278, 119 S.E. 142 (1923). . . . . .47-18; 47-22
Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 250 S.E.2d 352 . . . . . 39-14; 47-60; 47-64

[References are to pages]

Mutual of Omaha Ins. Co. v. Echols, 207 Va. 949, 154 S.E.2d 169 (1967) . . . . . 47-60

Myseros v. Sissler, 239 Va. 8, 387 S.E.2d 463 (1990) . . . . . 33-2; 33-4, 33-5

## N

N. Va. Kitchen, Bath & Basement, Inc. v. Ellis, 299 Va. 615, 856 S.E.2d 593 (2021) . . . . . 9-9

N.Y. Life Ins. Co. v. Barton, 166 Va. 426, 186 S.E. 65 . . . . . 47-44

N.Y. Life Ins. Co. v. Eicher, 198 Va. 255, 93 S.E.2d 269 . . . . . 47-64

Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) . . . . . 9-4; 9-7; 33-4

Nash v. Norfolk & W. Ry., 93 F. Supp. 2d 703 (W.D. Va. 2000) . . . . . 21-3; 21-20

National Airlines v. Shea, 223 Va. 578, 292 S.E.2d 308 . . . . . 39-10

National Cab Co. v. Bagby, 196 Va. 703, 85 S.E.2d 270, 196 Va. 1027 (1955) . . . . . 13-6

National Energy Corp. v. O'Quinn, 223 Va. 83, 286 S.E.2d 181 . . 26-3; 26-6, 26-7; 26-10; 26-12; 26-14; 26-18

National R. Passenger Corp. v. Catlett Volunteer Fire Co., 241 Va. 402, 404 S.E.2d 216 (1991) . . . 11-6; 11-10; 11-16; 45-56

National Union Fire Ins. Co. v. Bruce, 208 Va. 595, 159 S.E.2d 815 (1968) . . . . . 2-20; 4-26; 18-32

National Union Fire Ins. Co. v. Dixon, 206 Va. 568, 145 S.E.2d 187, 145 S.E.2d 568 (1965) . . . . . 47-36

Nationwide Ins. Co. v. Patterson, 229 Va. 627, 331 S.E.2d 490 (1985) . . . . . 39-24

Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch., 293 Va. 331, 798 S.E.2d 170 (2017) . . . . . 47-42

Nationwide Mut. Ins. v. Hylton, 260 Va. 56, 530 S.E.2d 421 . . . . . 11-6

Nationwide Mut. Ins. Co. v. Allstate Ins. Co., 427 F.2d 715 (4th Cir. 1970) . . . . . 47-84

Nationwide Mut. Ins. Co. v. Cole, 203 Va. 337, 124 S.E.2d 203 (1962) . . . . . 47-84

Nationwide Mut. Ins. Co. v. Hargraves, 242 Va. 88, 405 S.E.2d 848 (1991) . . . . . 2-14; 39-18

Nationwide Mut. Ins. Co. v. Hylton, 260 Va. 56, 530 S.E.2d 421 (2000) . . . . . 11-6

Nationwide Mut. Ins. Co. v. Martin, 210 Va. 354, 171 S.E.2d 239 (1969) . . . . . 44-12

Nationwide Mut. Ins. Co. v. Muncy, 217 Va. 916, 234 S.E.2d 70 (1977) . . . . . 44-12

Nationwide Mut. Ins. Co. v. Smelser, 264 Va. 109, 563 S.E.2d 760 (2002) . . . . . 47-85

Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 524 S.E.2d 649 (2000) . . . . . 47-88

Nationwide Mut. Ins. Co. v. Vaughn, 307 F. Supp. 805 . . . . . 47-84

Navar, Inc. v. Fed. Bus. Council, 291 Va. 338, 784 S.E.2d 296 (2016) . . . . . 9-12

Neeley v. Johnson, 215 Va. 565, 211 S.E.2d 100 (1975) . . . . . 2-24; 9-14

Neely v. White, 14 S.E.2d 337, 177 Va. 358 (1941) . 45-83

Neighbors v. Moore, 216 Va. 514, 219 S.E.2d 692 . 10-54; 10-62; 10-64; 17-14

Nelson v. Commonwealth, 235 Va. 228, 368 S.E.2d 239 (1988) . . . . . 35-48

Nelson v. Dayton, 36 S.E.2d 535, 184 Va. 754 (1946) . . . . . 14-12

Nelson v. Great E. Resort Mgmt., Inc., 265 Va. 98, 574 S.E.2d 277 (2003) . . . . . 6-4; 6-26, 6-27; 6-30

Nelson, 235 Va. 228, 368 S.E.2d 239 . . . . . 35-48

New Franklin Enterprises v. Sabo, 480 N.W.2d 326, 192 Mich. App. 219 . . . . . 37-6

New York Life Ins. Co. v. Barton, 166 Va. 426, 186 S.E. 65 (1936) . . . . . 47-44

New York Life Ins. Co. v. Eicher, 198 Va. 255, 93 S.E.2d 269 (1956) . . . . . 47-24; 47-64

New York, Philadelphia & Norfolk R.R. Co. v. Thomas, 92 Va. 606, 24 S.E. 264 . . . . . 1-9, 1-10

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) . 37-3; 37-7, 37-8; 37-10; 37-18, 37-19; 37-22; 37-26; 37-48

Newbern v. Joseph Baker & Co., 147 Va. 996, 133 S.E. 500 (1926) . . . . . 34-10

Newell v. Riggins, 197 Va. 490, 90 S.E.2d 150 (1955) . . . . . 10-30

Newman v. Erie Ins. Exch., 256 Va. 501, 507 S.E.2d 348 (1998) . . . . . 47-85

Newport News v. Anderson, 223 S.E.2d 869, 216 Va. 791 (1976) . . . . . 32-14

Newport News v. Hertzler, 216 Va. 587, 221 S.E.2d 146 (1976) . . . . . 26-6

News Leader Co. v. Kocen, 173 Va. 95, 3 S.E.2d 385 (1939) . . . . 9-4; 37-9; 37-48; 37-64; 37-66; 45-118

Newspaper Publ'g Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132 . . . . . 9-33; 37-3; 37-10; 37-58

Newton v. Commonwealth, 29 Va. App. 433, 512 S.E.2d 846 (1999) . . . . . 2-38

Nicholaou v. Harrington, 217 Va. 618, 231 S.E.2d 318 . . . . . 10-58

Nichols v. Kaiser Found. Health Plan, Inc., 257 Va. 491, 514 S.E.2d 608 (1999) . . . . . 35-3; 35-22

Nichols v. Southern R. Co., 187 Va. 89, 45 S.E.2d 913 (1948) . . . . . 18-34

Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951) . . . . . 39-34; 42-4; 42-20

[References are to pages]

Niese v. City of Alexandria, 264 Va. 230, 564 S.E.2d 127 (2002). . . . . .31-1; 31-4, 31-5
Nizan v. Wells Fargo Bank Minn. N.A., 274 Va. 481, 650 S.E.2d 497 (2007) . . . . . .9-8; 9-14
Noakes v. Commonwealth, 280 Va. 338, 699 S.E.2d 284 (2010) . . . . . .5-10
Nolan v. City of Richmond, 194 Va. 943, 76 S.E.2d 126. . . . . .32-6
Nolde Bros., Inc. v. Chalkley, 184 Va. 553, 35 S.E.2d 827 (1945). . . . . .47-16
Noll v. Rahal, 219 Va. 795, 250 S.E.2d 741 (1979) . 35-12
Norfolk v. Bennett, 140 S.E.2d 655, 205 Va. 877 (1965). . . . . .39-10
Norfolk v. Hall, 9 S.E.2d 356, 175 Va. 545 (1940) . 32-14
Norfolk v. Norfolk County, 120 Va. 356, 91 S.E. 820 . . . . . .45-54
Norfolk & Portsmouth Belt Line R. R. Co. v. Barker, 221 Va. 924, 275 S.E.2d 613 (1981) . . . . . .1-10; 6-12
Norfolk & Portsmouth Belt Line R.R. Co. v. C.F. Mueller Co., 197 Va. 533, 90 S.E.2d 135. . . . . .2-14
Norfolk & Portsmouth Belt Line R.R. Co. v. Freeman, 64 S.E.2d 732, 192 Va. 400 (1951). . . . . .18-30
Norfolk & Portsmouth R.R. v. Barker, 221 Va. 924, 275 S.E.2d 613 . . . . . 1-10; 6-12
Norfolk & W. R. Co. v. Baker, 226 Va. 527, 311 S.E.2d 766 (1984). . . . . .20-6
Norfolk & W. R. Co. v. Chrisman, 247 S.E.2d 457, 219 Va. 184 (1978) . . . . . .20-4; 20-6
Norfolk & W. R. Co. v. Faris, 156 Va. 205, 157 S.E. 819 (1931). . . . . .18-52
Norfolk & W. R. Co. v. Gilliam, 178 S.E.2d 499, 211 Va. 542 (1971) . . . . . .18-12; 18-30
Norfolk & W. R. Co. v. Greenfield, 219 Va. 122, 244 S.E.2d 781 (1978). . . . . .18-22
Norfolk & W. R. Co. v. Hardy, 152 Va. 783, 148 S.E. 839 (1929). . . . . .18-26, 18-27
Norfolk & W. R. Co. v. Keatley, 211 Va. 507, 178 S.E.2d 516 (1971). . . . . .21-4
Norfolk & W. R. Co. v. Sonney, 236 Va. 482, 374 S.E.2d 71. . . . . .21-18
Norfolk & W. R. Co. v. Wright, 217 Va. 515, 229 S.E.2d 890 (1976) . . . . . .18-30
Norfolk & W. R. v. Brame, 109 Va. 422, 63 S.E. 1018 . . . . . .36-2
Norfolk & W. Ry. Co. v. Birchfield, 105 Va. 809, 54 S.E. 879 . . . . . .22-12; 22-14
Norfolk & W. Ry. Co. v. Brame, 109 Va. 422, 63 S.E. 1018 . . . . . 22-10; 22-14
Norfolk & W. Ry. Co. v. Chittum, 251 Va. 408, 468 S.E.2d 877 . . . . . .21-10
Norfolk & W. Ry. Co. v. Faris, 156 Va. 205, 157 S.E. 819 . . . . . .18-52
Norfolk & W. Ry. Co. v. Fletcher, 198 Va. 397, 94 S.E.2d 251. . . . . .18-4; 18-30
Norfolk & W. Ry. Co. v. Gilliam, 211 Va. 542, 178 S.E.2d 499 . . . . . .18-12; 18-26; 18-30
Norfolk & W. Ry. Co. v. Greenfield, 219 Va. 122, 244 S.E.2d 781 (1978). . . . . .18-8; 18-22
Norfolk & W. Ry. Co. v. Hagy, 110 S.E.2d 177, 201 Va. 183 (1959). . . . . .18-6; 18-10; 18-34
Norfolk & W. Ry. Co. v. Hardy, 152 Va. 783, 148 S.E. 839 . . . . . .18-26
Norfolk & W. Ry. Co. v. Hodges, 248 Va. 254, 448 S.E.2d 592. . . . . .21-3; 21-6; 21-10; 21-18
Norfolk & W. Ry. Co. v. Hughes, 247 Va. 113, 439 S.E.2d 411 . . . . . .21-10
Norfolk & W. Ry. Co. v. Johnson, 207 Va. 980, 154 S.E.2d 134 (1967). . . . . .8-30
Norfolk & W. Ry. Co. v. Johnson, 251 Va. 37, 465 S.E.2d 800. . . . . .21-6; 21-10
Norfolk & W. Ry. Co. v. Keatley, 211 Va. 507, 178 S.E.2d 516. . . . . .21-4
Norfolk & W. Ry. Co. v. Keeling, 265 Va. 228, 576 S.E.2d 452. . . . . .21-6
Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 . . . . . .21-22
Norfolk & W. Ry. Co. v. Simmons, 127 Va. 419, 103 S.E. 609 (1920) . . . . . .18-27
Norfolk & W. Ry. Co. v. Sonney, 236 Va. 482, 374 S.E.2d 71. . . . . .21-18; 21-22
Norfolk & W. Ry. Co. v. Sykes, 200 Va. 541, 106 S.E.2d 734 . . . . . .18-32
Norfolk & W. Ry. Co. v. Wright, 217 Va. 515, 229 S.E.2d 890 . . . . . .18-30
Norfolk & W. Ry. v. Chittum, 251 Va. 408, 468 S.E.2d 877. . . . . .2-20; 21-10
Norfolk & W. Ry. v. Hagy, 201 Va. 183, 110 S.E.2d 177 . . . . . .18-34
Norfolk & W. Ry. v. Hodges, 248 Va. 254, 448 S.E.2d 592 (1994). . . . . .21-3; 21-6; 21-8; 21-10; 21-18
Norfolk & W. Ry. v. Hughes, 247 Va. 113, 439 S.E.2d 411 (1994). . . . . .21-10
Norfolk & W. Ry. v. Johnson, 251 Va. 37, 465 S.E.2d 800 (1996) . . . . . .21-6; 21-10
Norfolk & W. Ry. v. Virginian Ry., 110 Va. 631, 66 S.E. 863 . . . . . .46-42
Norfolk & Western Ry. Co. v. Baker, 226 Va. 527, 311 S.E.2d 766 (1984). . . . . .20-4
Norfolk & Western Ry. Co. v. Birchfield, 105 Va. 809, 54 S.E. 879 (1906) . . . . . .22-12; 22-14
Norfolk & Western Ry. Co. v. Brame, 109 Va. 422, 63 S.E. 1018 (1909). . . . . .22-10; 22-14; 36-2

[References are to pages]

Norfolk & Western Ry. Co. v. Chrisman, 219 Va. 184, 247 S.E.2d 457 . . . . . 20-4; 20-6
Norfolk & Western Ry. Co. v. Virginian R. Co., 110 Va. 631, 66 S.E. 863 (1910) . . . . . 46-42
Norfolk Bev. Co. v. Cho, 259 Va. 348, 525 S.E.2d 287 (2000) . . . . . 9-5; 9-8
Norfolk County Water Co. v. Ethendge, 120 Va. 379, 91 S.E. 133 (1917) . . . . . 26-14
Norfolk Hosiery & Underwear Mills v. Aetna Hosiery Co., 124 Va. 221, 98 S.E. 43. . . . . 1-9
Norfolk Redevelopment & Hous. Auth. v. C&C Real Estate, Inc., 272 Va. 2, 630 S.E.2d 505. . . . . 46-16
Norfolk Ry. & Light Co. v. Higgins, 108 Va. 324, 61 S.E. 766 . . . . . 1-9
Norfolk S. R. Co. v. Banks, 141 Va. 715, 126 S.E. 662 (1925) . . . . . 2-42
Norfolk S. R. Co. v. Fincham, 213 Va. 122, 189 S.E.2d 380 (1972). . . . . 19-4
Norfolk S. R. Co. v. Rayburn, 213 Va. 812, 195 S.E.2d 860 (1973). . . . . 21-3; 21-6; 21-18
Norfolk S. R. Co. v. Tomlinson, 116 Va. 153, 81 S.E. 89 (1914) . . . . . 22-4
Norfolk S. R. Co. v. Wood, 182 Va. 30, 28 S.E.2d 15 (1943) . . . . . 6-12
Norfolk S. Ry. v. Bowles, 261 Va. 21, 539 S.E.2d 727 (2001) . . . . . 21-6
Norfolk S. Ry. v. Rogers, 270 Va. 468, 621 S.E.2d 59 (2005) . . . . . 21-6; 21-10
Norfolk S. Ry. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638. . . . . 21-2
Norfolk S. Ry. v. Thomas, 258 Va. 516, 522 S.E.2d 620 (1999). . . . . 21-18
Norfolk S. Ry. v. Trimiew, 253 Va. 22, 480 S.E.2d 104 (1997) . . . . . 21-6; 21-10
Norfolk S. Ry. Co. v. Bowles, 261 Va. 21, 539 S.E.2d 727. . . . . 21-6
Norfolk S. Ry.Co. v. Fincham, 213 Va. 122, 189 S.E.2d 380. . . . . 19-4
Norfolk S. Ry. Co. v. Rayburn, 213 Va. 812, 195 S.E.2d 860. . . . . 21-3; 21-6; 21-18
Norfolk S. Ry. Co. v. Rogers, 270 Va. 468, 621 S.E.2d 59 . . . . . 21-6; 21-10
Norfolk S. Ry. Co. v. Sumner, 297 Va. 35, 822 S.E.2d 809. . . . . 21-2; 21-10
Norfolk S. Ry. Co. v. Thomas, 258 Va. 516, 522 S.E.2d 620 (1999) . . . . . 21-16; 21-18
Norfolk S. Ry. Co. v. Trimiew, 253 Va. 22, 480 S.E.2d 104. . . . . 21-6; 21-10
Norfolk S. Ry. Co. v. Wood, 182 Va. 30, 28 S.E.2d 15 (1943) . . . . . 2-52
Norfolk Shipbuilding & Drydock v. Scovel, 240 Va. 472, 397 S.E.2d 884 (1990) . . . . . 4-14
Norfolk Southern Ry. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007). . . . . 21-2
Norfolk Southern Ry. Co. v. Sumner, 297 Va. 35, 822 S.E.2d 809 (2019). . . . . 21-2; 21-10
Norfolk-S. Ry. Co. v. Tomlinson, 116 Va. 153, 81 S.E. 89 (1914) . . . . . 22-4
Norman v. Insurance Co. of North America, 218 Va. 718, 239 S.E.2d 902 (1978). . . . . 47-66
Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949). . . . . 45-18
North British & Mercantile Ins. Co. v. Edmundson, 104 Va. 486, 52 S.E. 350. . . . . 47-52
North British & Mercantile Ins. Co. v. Nidiffer, 112 Va. 591, 72 S.E. 130. . . . . 47-54
North River Ins. Co. v. Belcher, 155 Va. 588, 155 S.E. 699 (1930) . . . . . 47-44; 47-50; 47-61
North River Ins. Co. v. Gourdine, 205 Va. 57, 135 S.E.2d 120 (1964) . . . . . 47-56
North River Ins. Co. v. Lewis, 137 Va. 322, 119 S.E. 43 (1923). . . . . 47-50; 47-60
North River Insurance Co. v. Gourdine, 205 Va. 57, 135 S.E.2d 120 . . . . . 47-56
Northern Neck Mut. Fire Ass'n v. Turlington, 136 Va. 44, 116 S.E. 363 . . . . . 47-12; 47-18; 47-26
Northern Virginia Kitchen, Bath & Basement, Inc. v. Ellis, 299 Va. 615, 856 S.E.2d 593 . . . . . 9-9
Northern Virginia Power Co. v. Bailey, 194 Va. 464, 73 S.E.2d 425 (1952). . . . . 2-28; 3-12; 30-14
Northwestern Nat'l Ins. Co. v. Cohen, 138 Va. 177, 121 S.E. 507 (1924) . . . . . 47-56
Norview Cars, Inc. v. Crews, 208 Va. 148, 156 S.E.2d 603 (1967). . . . . 9-24; 9-28; 9-30
Nuckols v. Nuckols, 228 Va. 25, 320 S.E.2d 734 (1984) . . . . . 39-2; 39-40

## O

O'Brian v. Langley Sch., 256 Va. 547, 507 S.E.2d 363. . . . . 45-124, 45-125
O'Brien v. Everfast, Inc., 254 Va. 326, 491 S.E.2d 712 (1997). . . . . 23-14
O'Brien v. Snow, 215 Va. 403, 210 S.E.2d 165 (1974) . . . . . 9-33
O'Connell v. Bean, 263 Va. 176, 556 S.E.2d 741 (2002) . . . . . 42-4; 42-8
O'Connor v. Tice, 281 Va. 1, 704 S.E.2d 572 (2011). . . . . 41-2; 41-6; 41-8; 41-14; 41-20
Oak Knolls Realty Corp. v. Thomas, 212 Va. 396, 184 S.E.2d 809 (1971) . . . . . 1-3
Oberbroeckling v. Lyle, 234 Va. 373, 362 S.E.2d 682 (1987) . . . . . 3-14

[References are to pages]

Ocean Acci. & Guarantee Corp. v. Glover, 165 Va. 283, 182 S.E. 221 (1935) . . . . . 47-66
Oden v. Salch, 237 Va. 525, 379 S.E.2d 346 (1989) . 1-10; 9-12
Oden v. South Norfolk Redev. & Housing Auth., 203 Va. 638, 125 S.E.2d 843 . . . . . 24-14; 24-18
Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 645 S.E.2d 520 (2007) . . . . . 8-28; 33-10
Old Dominion Branch, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745, 86 LRRM 2740 . . . . . 37-14
Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 195 S.E.2d 854 (1973) . . . . . 47-60, 47-61; 47-64
Oleyar v. Kerr, 217 Va. 88, 225 S.E.2d 398 . 42-4; 42-8, 42-9
Oliphant v. Snyder, 206 Va. 932, 147 S.E.2d 122 (1966) . . . . . 15-4
Oliver v. Cashin, 192 Va. 540, 65 S.E.2d 571 (1951) . . . . . 24-7; 24-10; 24-14; 24-18
Oliver v. Forsyth, 190 Va. 710, 58 S.E.2d 49 (1950).10-18; 10-86
Oliver v. Mutual Life Ins. Co., 97 Va. 134, 33 S.E. 536 (1899). . . . . 47-29
Omega Protein, Inc. v. Forrest, 284 Va. 166, 732 S.E.2d 432, 732 S.E.2d 708 . . . . . 21-10
Online Res. Corp. v. Lawlor, 285 Va. 40, 736 S.E.2d 886 (2013). . . . . 45-70
Opanowich v. Commonwealth, 196 Va. 342, 83 S.E.2d 432 (1954). . . . . 2-16
Orebaugh v. Antonious, 58 S.E.2d 873, 190 Va. 829 (1950). . . . . 45-118
Orthopedic & Sports Physical Therapy Assocs. v. Summit Group Props, LLC, 283 Va. 777, 724 S.E.2d 718.45-106
Ortiz v. Barrett, 222 Va. 118, 278 S.E.2d 833 (1981) . . . . . 42-8
Osborne v. National Union Fire Ins. Co., 251 Va. 53, 465 S.E.2d 835 (1996) . . . . . 47-56, 47-57
Otey v. Commonwealth, 61 Va. App. 346, 735 S.E.2d 255 (2012) . . . . . 17-8
Our Lady of Peace, Inc. v. Morgan, 297 Va. 832, 832 S.E.2d 15. . . . . 8-8; 8-10; 8-14; 8-16; 8-20; 8-22
Outlaw v. Pearce, 176 Va. 458, 11 S.E.2d 600 (1940).1-9
Owen v. Dixon, 162 Va. 601, 175 S.E. 41 (1934) . 9-14
Owens v. DRS Auto. Fantomworks, Inc., 288 Va. 489, 764 S.E.2d 256 (2014) . . . . . 2-14
Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 413 S.E.2d 630 (1992) . 1-10; 9-32; 9-44; 34-16; 34-18; 34-46; 34-54
Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd., 237 Va. 649, 379 S.E.2d 344 (1989). . . . . 1-10
Oxenham v. Johnson, 241 Va. 281, 402 S.E.2d 1 (1991) . . . . . 41-6; 41-24

## P

P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 41 S.E.2d 1 (1947) . . . . . 9-46
P.Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920) . . . . . 2-26
Pace v. Richmond, 231 Va. 216, 343 S.E.2d 59 (1986). . . . . 48-20
Pacific Fire Ins. Co. v. Bowers, 163 Va. 349, 175 S.E. 763 (1934). . . . . 47-10
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). . . . . 9-35
Pack v. Doe, 236 Va. 323, 374 S.E.2d 22 (1988). . 7-16
Packard Norfolk, Inc. v. Miller, 95 S.E.2d 207, 198 Va. 557 (1956) . . . . 39-6; 39-14; 39-28; 39-38; 45-106
Packett v. Herbert, 237 Va. 422, 377 S.E.2d 438 (1989). . . . . 26-14; 26-18
Paddock v. Mason, 48 S.E.2d 199, 187 Va. 809 (1948). . . . . 45-96
Padula-Wilson v. Landry, 298 Va. 565, 841 S.E.2d 864 (2020). . . . . 37-11
Page v. Arnold, 227 Va. 74, 314 S.E.2d 57 (1984) . 29-6
Painter v. Lingon, 71 S.E.2d 355, 193 Va. 840 (1952). . . . . 8-36; 8-40
Pallas v. Zaharopoulos, 219 Va. 751, 250 S.E.2d 357 (1979) . . . . . 41-2; 41-10; 41-20
Palmer v. Showalter, 126 Va. 306, 101 S.E. 136 (1919) . . . . . 43-6
Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., 276 Va. 285, 662 S.E.2d 77 . . . . . 45-66
Panorama Resort v. Nichols, 165 Va. 289, 182 S.E. 235 (1935). . . . . 29-10; 29-14; 29-16
Panousos v. Allen, 245 Va. 60, 425 S.E.2d 496 (1993). . . . . 5-8; 5-10
Panther Coal Co. v. Looney, 185 Va. 758, 40 S.E.2d 298 (1946). . . . . 26-10
Parfitt v. Parfitt, 277 Va. 333, 672 S.E.2d 827 . . 45-100
Parish v. Parish, 281 Va. 191, 704 S.E.2d 99 (2011).39-2; 48-20; 48-34
Parker v. Carilion Clinic, 296 Va. 319, 819 S.E.2d 809 (2018). .2-46; 4-3; 8-8; 8-10; 8-14; 8-16; 8-20; 8-22
Parker v. McCoy, 212 Va. 808, 188 S.E.2d 222 (1972). . . . . 36-14; 36-18
Parker v. West, 191 Va. 710, 62 S.E.2d 862 (1951) . 43-5; 43-20
Parker, 296 Va. 319, 819 S.E.2d 809 . . . . . 8-10; 8-16
Parker-Smith v. Sto Corp., 262 Va. 432, 551 S.E.2d 615 (2001) . . . . . 39-7; 40-22
Parr v. Alderwoods Group, Inc., 268 Va. 461, 604 S.E.2d 431 (2004) . . . . . 45-62
Parr v. Commonwealth, 198 Va. 721, 96 S.E.2d 160 (1957) . . . . . 2-38

[References are to pages]

Parramore v. Taylor, 52 Va. 220 (1854) . . . . . 48-14
Parson v. Miller, 296 Va. 509, 822 S.E.2d 169 (2018). . . . . .27-12; 48-21; 48-34, 48-35
Paschall & Gresham v. Gilliss, 113 Va. 643, 75 S.E. 220. . . . . .43-4, 43-5; 43-12
Pascoe Steel Corp. v. Shannon, 224 Va. 530, 298 S.E.2d 97 (1982) . . . . . 45-5
Patrick v. Summers, 235 Va. 452, 369 S.E.2d 162 (1988). . . . . .39-10; 39-30
Patton, Temple & Williamson, Inc. v. Garnett, 147 Va. 1009, 133 S.E. 495 . . . . . 43-6
Payne v. Carroll, 250 Va. 336, 461 S.E.2d 837 (1995). . . . . .2-38, 2-39
Payne v. Rice, 210 Va. 514, 171 S.E.2d 826 (1970). 48-14
Payne v. Simmons, 232 Va. 379, 350 S.E.2d 637. 39-34; 45-36
Paytan v. Rowland, 208 Va. 24, 155 S.E.2d 36 (1967). . . . . .24-10
Pearsall v. Richmond Redev. & Hous. Auth., 218 Va. 892, 242 S.E.2d 228 (1978). . . . . .46-16
Pearson v. Canada Contr'g Co., 232 Va. 177, 349 S.E.2d 106 ((1986)). . . . . .23-4; 23-6; 23-10; 23-36
Peck v. Tegtmeyer, 834 F. Supp. 903 (W.D. Va. 1992). . . . . .35-38
Peck Iron & Metal Co., 200 Va. 698, 107 S.E.2d 421. . . . . .20-8
Peele v. Bright, 119 Va. 182, 89 S.E. 238 (1916). .1-11
Peerless Ins. Co. v. Associates Fin. Servs., 218 Va. 876, 241 S.E.2d 792. . . . . .47-29
Peerless Ins. Co. v. County of Fairfax, 274 Va. 236, 645 S.E.2d 478. . . . . .31-2
Pendleton v. Newsome, 290 Va. 162, 772 S.E.2d 759 (2015) . . . . . 37-2; 37-18; 37-42
Penick v. Ratcliffe, 149 Va. 618, 140 S.E. 664 (1927). . . . . .37-12
Pennsylvania Cas. Co. v. Simopoulos, 235 Va. 460, 369 S.E.2d 166 . . . . . .47-48
Penoso v. D. Pender Grocery Co., 177 Va. 245, 13 S.E.2d 310 (1941) . . . . . 1-8
People's Bank v. People's Nat'l Bank, 148 Va. 651, 139 S.E. 325 . . . . . 45-74
Peoples Life Ins. Co. v. Parker, 179 Va. 662, 20 S.E.2d 485 (1942) . . . . . 47-16; 47-18; 47-29; 47-32
Perdieu v. Blackstone Family Practice Ctr., Inc., 264 Va. 408, 568 S.E.2d 703 (2002) . . . . 35-3; 35-9; 35-12
Perk v. Vector Res. Group, 253 Va. 310, 485 S.E.2d 140 (1997). . . . . .40-2; 40-6; 40-8
Perkins v. Carr, 227 Va. 16, 313 S.E.2d 372 (1984). 10-72; 10-92
Perlin v. Chappell, 198 Va. 861, 96 S.E.2d 805 (1957). . . . . .4-6; 29-6; 29-10
Perry v. Thompson, 196 Va. 817, 86 S.E.2d 35 (1955). . . . . .10-18
Pesta v. CBS, Inc., 686 F. Supp. 166 (E.D. Mich. 1988). . . . . .37-7
Petcosky v. Bowman, 197 Va. 240, 89 S.E.2d 4 (1955) . . . . . 2-58
Peterfish v. Frantz, 424 N.W.2d 25, 168 Mich. App. 43 (Mich. Ct. App. 1988). . . . . .37-3
Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869 (1981). . . . . .9-8
Petherbridge v. Bell, 146 Va. 822, 132 S.E. 683 (1926) . . . . . .41-8
Pettibone Wood Mfg. Co. v. Pioneer Constr. Co., 122 S.E.2d 885, 203 Va. 152 (1961) . . . . . .45-124
Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S.E. 813. . . . . .23-6; 23-10
Pfizer, Inc. v. Jones, 221 Va. 681, 272 S.E.2d 43 (1980). . . . . .34-46; 34-50
PGI, Inc. v. Rathe Prods., Inc., 265 Va. 334, 576 S.E.2d 438 (2003) . . . . . 4-30; 8-34; 9-32
Philip Morris, Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268 . . . . . 4-31; 5-10; 6-4; 6-26, 6-27; 8-30; 23-34
Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) . . . . . .9-35
Phillip Morris, Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268. . . . . .8-30
Phillips v. Fulghum, 203 Va. 543, 125 S.E.2d 835 (1962). . . . . .2-44; 9-9
Phillips v. Mazyck, 273 Va. 630, 643 S.E.2d 172 (2007) . . . . . 45-3; 45-24; 45-28
Phillips v. Stewart, 148 S.E.2d 784, 207 Va. 214 (1966). . . . . .14-12
Phillips, 203 Va. 543, 125 S.E.2d 835. . . . . .2-44
Phillips, 207 Va. 214, 148 S.E.2d 784 . . . . . 14-12
Phillips, 273 Va. 630, 643 S.E.2d 172 . . . . . .45-28
Phoenix Indem. Co. v. Anderson, 170 Va. 406, 196 S.E. 629 (1938) . . . . . .47-84
Pickett v. Cooper, 202 Va. 60, 116 S.E.2d 48 (1960) . 7-5; 10-44; 10-48
Pickus v. Virginia State Bar, 232 Va. 5, 348 S.E.2d 202. . . . . .42-4
Piedmont Trust Bank v. Aetna Cas. & Sur. Co., 210 Va. 396, 171 S.E.2d 264 . . . . . 45-106
Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). . . . . .38-6
Pike v. Eubank, 197 Va. 692, 90 S.E.2d 821 (1956). 36-6; 36-18; 36-22; 36-24; 36-26; 36-30
Pike v. Hagaman, 292 Va. 209, 787 S.E.2d 89 (2016) . . . . . .31-6
Pike, 197 Va. 692, 90 S.E.2d 821 . . . . . .36-6

[References are to pages]

Pilcher v. Pilcher, 117 Va. 356, 84 S.E. 667 (1915) . 48-14
Pilot Life Ins. Co. v. Karcher, 217 Va. 497, 229 S.E.2d 884 (1976) . . . . . .47-74
Pioneer Const. Co. v. Hambrick, 193 Va. 685, 70 S.E.2d 302 (1952) . . . . . .32-2; 32-12
Plant Lipford, Inc. v. E.W. Gates & Son Co., 127 S.E. 183, 141 Va. 325 (1925) . . . . . .45-92
Plummer v. Center Psychiatrists, 252 Va. 233, 476 S.E.2d 172 (1996) . . . . . .8-22
Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 495 S.E.2d 478 . . . . . .45-60; 45-132
Poindexter v. Commonwealth, 213 Va. 212, 191 S.E.2d 200 (1972) . . . . . .2-58
Poindexter v. Jones, 200 Va. 372, 106 S.E.2d 144 (1958) . . . . . .48-24
Poindexter v. May, 98 Va. 143, 34 S.E. 971 (1900).29-6
Poindexter, 200 Va. 372, 106 S.E.2d 144 . . . . . 48-24
Poliquin v. Daniels, 254 Va. 51, 486 S.E.2d 530 (1997) . . . . . .1-8; 9-48
Ponirakis v. Choi, 262 Va. 119, 546 S.E.2d 707 (2001) . . . . . .5-6; 6-4; 6-16
Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415 (2008) . . . . . .1-8
Porter v. Wilson, 244 Va. 366, 421 S.E.2d 440 (1992) . . . . . .27-6; 27-14
Portillo v. Nationwide Mut. Fire Ins. Co., 277 Va. 193, 671 S.E.2d 153 (2009) . . . . . .47-60
Portsmouth v. Cilumbrello, 129 S.E.2d 31, 204 Va. 11 (1963) . . . . . .32-2; 32-14
Poulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1996).9-8; 9-34; 37-10; 37-48; 37-52, 37-53; 37-56; 37-58
Powell v. Troland, 212 Va. 205, 183 S.E.2d 184 (1971) . . . . . .9-22
Powers v. Cherin, 249 Va. 33, 452 S.E.2d 666 (1995) . . . . . .9-22
Prager v. American Broadcasting Co., 569 F. Supp. 1229 . . . . . .37-6
Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 284 Va. 382, 732 S.E.2d 676 (2012) . . 9-6; 40-10; 40-14
Press, Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) . 37-3
Preston v. Land, 220 Va. 118, 255 S.E.2d 509 (1979).1-10; 37-32
Price v. Francis, 184 Va. 484, 35 S.E.2d 823 (1945).43-26
Price v. Taylor, 251 Va. 82, 466 S.E.2d 87 (1996) . 1-7; 39-30
Price's Ex'r v. Barham, 147 Va. 478, 137 S.E. 511 (1927) . . . . . .45-44
Prieto v. Commonwealth, 278 Va. 366, 682 S.E.2d 910 . . . . . .49-3
Prillaman v. Century Indem. Co., 49 F. Supp. 197 (W.D. Va. 1943) . . . . . .47-36
Prillaman v. Century Indem. Co., 138 F.2d 821 (4th Cir. 1943) . . . . . .47-36
Progressive Constr. Co. v. Thumm, 209 Va. 24, 161 S.E.2d 687 (1968) . . . . . .45-46
Prospect Dev. Co. v. Bershader, 258 Va. 75, 515 S.E.2d 291 . . . . . .39-2; 39-6; 39-10; 39-18; 39-28
Provident Life & Acci. Ins. Co. v. Nicholson, 157 Va. 345, 160 S.E. 5 (1931) . . . . . .47-52
Pruner v. State Highway Comm'r, 173 Va. 307, 4 S.E.2d 393 (1939) . . . . . .46-20
Puent v. Dickens, 245 Va. 217, 427 S.E.2d 340 (1993) . . . . . .9-34; 15-8
Pugh v. Yearout, 212 Va. 591, 186 S.E.2d 58 (1972) . 9-40
Pugsley v. Privette, 220 Va. 892, 263 S.E.2d 69 (1980) . . . . . 35-28; 36-6; 36-26; 36-30
Pullen v. Fagan, 204 Va. 601, 132 S.E.2d 718 (1963) . . . . . .10-26; 10-44
Pullen v. Nickens, 226 Va. 342, 310 S.E.2d 452 (1983) . . . . . .4-6; 10-104
Pulliam v. Coastal Emergency Servs., Inc., 257 Va. 1, 509 S.E.2d 307 (1999) . . . . . .35-2
Pulliam, 185 Va. 908, 41 S.E.2d 54 . . . . . 18-26, 18-27
Purposes of Defamation Action, 19 A.L.R.5th 1 (1994) . . . . . .37-7

## Q

Quality Home Builders v. Herrick, 210 Va. 723, 173 S.E.2d 846 . . . . . .43-5
Quesenberry v. Funk, 203 Va. 619, 125 S.E.2d 869 (1962) . . . . . .48-14

## R

R.A. Poff & Co. v. Ottaway, 191 Va. 779, 62 S.E.2d 865 . . . . . .43-4; 43-6; 43-22; 43-24
R.B. Hazard, Inc. v. Panco, 240 Va. 438, 397 S.E.2d 866 (1990) . . . . . .5-10
R.G. Pope Constr. Co. v. Guard Rail, 219 Va. 111, 244 S.E.2d 774 . . . . . .45-26; 45-82; 45-94
Radford v. Calhoun, 165 Va. 24, 181 S.E. 345 . . . 32-6
Radiance Capital Receivables Fourteen, LLC v. Foster, 298 Va. 14, 833 S.E.2d 867 (2019) . . . . . .45-86
Radvany v. Davis, 262 Va. 308, 551 S.E.2d 347 (2001) . . . . . .9-15; 9-20
Ragland, 59 Va. 323 . . . . . .45-82
Ragsdale v. Jones, 202 Va. 278, 117 S.E.2d 114 (1960) . . . . . .9-20; 10-58
Railway Express Agency, Inc. v. Moore, 201 Va. 928, 114 S.E.2d 626 (1960) . . . . . .10-18

[References are to pages]

Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986).35-8; 35-12; 35-22; 35-26
Ramdass v. Commonwealth, 248 Va. 518, 450 S.E.2d 360 (1994) . . . . . 2-39
Ramsey v. Comm'r of Hwys., 289 Va. 490, 770 S.E.2d 487 . . . . . .44-14; 46-18
Rappahannock Pistol & Rifle Club, Inc. v. Bennett, 262 Va. 5, 546 S.E.2d 440 (2001) . . . . . 40-6; 40-8
Rascher v. Friend, 279 Va. 370, 689 S.E.2d 661 (2010). . . . . .4-7; 5-4; 6-4; 6-16; 10-41; 10-96
Rastek Constr. & Dev. Corp. v. Gen. Land Commer. Co., LLC, 294 Va. 416, 806 S.E.2d 740 (2017) . 43-6; 45-94
Ratcliffe v. McDonald, 123 Va. 781, 97 S.E. 307. .9-46
Ratliff v. Jewell, 153 Va. 315, 149 S.E. 409 (1929).2-54
Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946). . . . . .27-2; 27-14
Raven Red Ash Coal Co. v. Griffith, 181 Va. 911, 27 S.E.2d 360 (1943). . . . . .23-28
Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51, 419 S.E.2d 627 (1992). . . . . .2-20
Ray v. Time, Inc., 452 F. Supp. 618 (W.D. Tenn. 1976). . . . . .37-3
Raytheon Tech. Servs. Co. v. Hyland, 273 Va. 292, 641 S.E.2d 84 (2007). . . . . .37-13; 37-22; 37-27
Rea's Adm'x v. Trotter & Bro., 67 Va. 585 (1875). .45-132
Read v. Daniel, 197 Va. 853, 91 S.E.2d 400 . . . . 6-10
Reagan v. Perez, 215 Va. 325, 209 S.E.2d 901 (1974). . . . . .23-18; 23-20
Realty Co. of Va. v. Burcum, 129 Va. 466, 106 S.E. 375 (1921) . . . . . 1-7; 43-4, 43-5; 43-12
Reams v. Doe, 236 Va. 237, 372 S.E.2d 405 (1988). 10-8; 10-18
RECP IV WG Land Investors v. Capital One, 295 Va. 268, 811 S.E.2d 817. . . . . .45-66
Redford v. Booker, 166 Va. 561, 185 S.E. 879 (1936) . . . . . 48-7; 48-14; 48-20; 48-34; 48-39
Redman v. John D. Brush & Co., 111 F.3d 1174 (4th Cir. 1997). . . . . .34-28
Reed v. Carlyle & Martin, Inc., 214 Va. 592, 202 S.E.2d 874 (1974). . . . . .34-58
Reed v. Church, 175 Va. 284, 8 S.E.2d 285 (1940). .2-16; 35-20
Reed, 214 Va. 592, 202 S.E.2d 874 . . . . . 34-58
Reese v. Snelson, 65 S.E.2d 547, 192 Va. 479 (1951). . . . . .14-12
Reiber v. James M. Duncan, Jr., & Associates, Inc., 206 Va. 657, 145 S.E.2d 157 (1965) . . 43-4, 43-5; 43-26
Reid v. Boward, 26 S.E.2d 27, 181 Va. 718 (1943) . 17-4; 17-6; 17-8
Reid v. Boyle, 259 Va. 356, 527 S.E.2d 137, 2000-1 Trade Cas. (CCH) P72833 (2000) . . . . . .45-90
Reid v. Field, 83 Va. 26, 1 S.E. 395 (1887). . . . .45-86
Reilly v. Shepherd, 273 VA. 728, 643 S.E.2d 216 (2007). . . . . .41-10; 41-14; 41-16; 41-24
Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341. .37-3
Reliance Life Ins. Co. v. Gulley, 134 Va. 468, 114 S.E. 551 . . . . . .47-29
Remley, 270 Va. 209, 618 S.E.2d 316. . . . . .39-6
Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner, 225 Va. 508, 303 S.E.2d 894. .45-46; 45-74
Reserve Life Ins. Co. v. Ferebee, 202 Va. 556, 118 S.E.2d 675 (1961) . . . . . .47-24
Retail Prop. Investors v. Skeens, 252 Va. 36, 471 S.E.2d 181 (1996). . . . . .2-14
Rety v. Green, 546 So. 2d 410, 14 Fla. L. Weekly 1829 (1989) . . . . . .37-7
Revell v. Ballard, 144 Va. 371, 132 S.E. 322 (1926).45-74
Revell v. Deegan, 192 Va. 428, 65 S.E.2d 543 (1951). . . . . .24-10
Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 64 S.E.2d 671 ((1951)). .28-16; 28-18; 28-20; 28-22
REVI, LLC v. Chi. Title Ins. Co., 290 Va. 203, 776 S.E.2d 808 (2015). . . . . .9-6; 47-52; 47-74
Revocor Corp. v. Commonwealth Transp. Comm'r, 259 Va. 389, 526 S.E.2d 4 (2000) . . 46-4; 46-10; 46-24; 46-38
RF&P Corp. v. Little, 247 Va. 309, 440 S.E.2d 908 (1994). . . . . .40-22
RGR, LLC v. Settle, 288 Va. 260, 764 S.E.2d 8 (2014) . . . . . .5-4; 10-3; 10-18; 18-6; 18-8
Rhoades v. Banking, Trust & Mortg. Co., 125 Va. 320, 99 S.E. 673 (1919) . . . . . .42-14
Rhoades v. Painter, 234 Va. 20, 360 S.E.2d 174 (1987) . . . . . .35-8; 35-12
Rice v. Charles, 260 Va. 157, 532 S.E.2d 318 (2000).2-54; 9-40; 15-12
Rice v. Freeland, 131 Va. 298, 109 S.E. 186 (1921).48-18
Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950).29-2; 29-6
Rich v. Commonwealth, 292 Va. 791, 793 S.E.2d 798 (2016) . . . . . .5-10
Richard L. Deal & Associates, Inc. v. Commonwealth, 224 Va. 618, 299 S.E.2d 346 (1983). . . . . .45-4
Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999). . . . . .49-14
Richeson v. Wilson, 187 Va. 536, 47 S.E.2d 393 (1948) . . . . . .43-4
Richman v. National Health Laboratories, Inc., 235 Va. 353, 367 S.E.2d 508 (1988). . . . . .35-2
Richmond v. Atlantic Co., 273 F.2d 902 (4th Cir. 1960). . . . . .30-8

[References are to pages]

Richmond v. Barry, 109 Va. 274, 63 S.E. 1074 (1909). . . . . .45-78
Richmond v. Branch, 137 S.E.2d 882, 205 Va. 424 (1964). . . . . .32-6
Richmond v. Cheatwood, 130 Va. 76, 107 S.E. 830 (1921). . . . . .45-128
Richmond v. Gay's Adm'x, 103 Va. 320, 49 S.E. 482 (1905). . . . . .5-10
Richmond v. Leaker, 99 Va. 1, 37 S.E. 348 (1900) . 32-12
Richmond v. Old Dominion Iron & Steel Corp., 212 Va. 611, 186 S.E.2d 30 (1972). . . . . .46-25
Richmond v. Williams, 114 Va. 698, 77 S.E. 492 (1913). . . . . .46-25
Richmond & Mecklenburg R.R. Co. v. Humphreys, 90 Va. 425, 18 S.E. 901. . . . . .46-24
Richmond & Petersburg Elec. Ry. Co. v. Seaboard Air Line Ry., 103 Va. 399, 49 S.E. 512 (1905). . .46-20
Richmond Bridge Corp. v. Priddy, 167 Va. 114, 187 S.E. 518 (1936). . . . . .23-4
Richmond Coca-Cola Bottling Works v. Andrews, 173 Va. 240, 3 S.E.2d 419 (1939) . . . . . 4-16; 4-20
Richmond Eng'g & Mfg. Corp. v. Loth, 135 Va. 110, 115 S.E. 774. . . . . .45-14; 45-16; 45-36
Richmond Greyhound Lines, Inc. v. Brown, 203 Va. 950, 128 S.E.2d 267 (1962). . . . . .10-18
Richmond Guano Co. v. E.I. Du Pont de Nemours & Co., 284 F. 803 . . . . . .47-16
Richmond Med. Supply Co. v. Clifton, 235 Va. 584, 369 S.E.2d 407 . . . . . 45-120
Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 507 S.E.2d 344, 256 Va. 553 (1998) . . . . . 39-6
Richmond Newspapers, Inc. v. Gill, 224 Va. 92, 294 S.E.2d 840 (1982). . . . . .8-28
Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987) . . . . . .37-3; 37-13
Richmond Passenger & Power Co. v. Steger, 101 Va. 319, 43 S.E. 612. . . . . .1-9
Richmond Redev. & Hous. Auth. v. Laburnum Const. Corp., 195 Va. 827, 80 S.E.2d 574 . . . . . 45-120
Rickman v. Commonwealth, 294 Va. 531, 808 S.E.2d 395 (2017) . . . . . .49-2
Ricks v. Sumler, 179 Va. 571, 19 S.E.2d 889 (1942). . . . . .45-56; 45-132
Riddick v. State Capital Ins. Co., 271 F.2d 641 (4th Cir. 1959). . . . . .47-36
Riggle v. Wadell, 216 Va. 577, 221 S.E.2d 142 (1976). . . . . .10-104
Riley v. Commonwealth, 277 Va. 467, 675 S.E.2d 168 (2009). . . . . .36-24
Riley v. Harris, 211 Va. 359, 177 S.E.2d 630 (1970). . . . . .10-44; 10-48
Riner, 239 Va. 94, 387 S.E.2d 476. . . . . .46-8; 46-25
Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 636 S.E.2d 416 (2006). . . . . .35-8; 35-22; 35-46
Riverside Owner, L.L.C. v. City of Richmond, 282 Va. 62, 711 S.E.2d 533 (2011). . . . . .2-16
Riverview Land Co. v. Dance, 98 Va. 239, 35 S.E. 720 (1900). . . . . .47-12
Rizzo v. Schiller, 248 Va. 155, 445 S.E.2d 153 (1994). . . . . .35-32
Roanoke v. Sartini, 123 Va. 415, 96 S.E. 763 (1918). . . . . .32-10
Roanoke Hosp. Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155. . . . . .45-110; 45-120
Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559. . . . . .7-12; 35-46
Roanoke Hospital Asso. v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155 (1975). . . . . .45-110; 45-120
Roanoke Hospital Asso. v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963). . . . . .7-12; 35-46
Roanoke Ry. & Elec. Co., 159 Va. 289, 165 S.E. 398. . . . . .45-74
Roanoke Ry. & Elec. Co. v. Brown, 154 S.E. 526, 155 Va. 259 (1930). . . . . .32-6
Roanoke Ry. & Elec. Co. v. Virginian Ry. Co., 159 Va. 289, 165 S.E. 398 . . . . . .45-74
Roanoke Ry. & Elec. Co. v. Whitner, 173 Va. 253, 3 S.E.2d 169. . . . . .5-10
Roark v. Hicks, 234 Va. 470, 362 S.E.2d 711 (1987) . 8-34
Robbins v. Old Dominion Power Co., 204 Va. 390, 131 S.E.2d 274 (1963). . . . . .30-4
Roberts v. CSX Transp., Inc., 279 Va. 111, 688 S.E.2d 178 (2010). . . . . .21-2
Roberts v. Mundy, 208 Va. 236, 156 S.E.2d 593 (1967). . . . . .10-114
Robertson v. City of Alexandria, 210 Va. 418, 171 S.E.2d 692 (1970). . . . . .31-2
Robertson v. Robertson, 119 S.E. 140, 137 Va. 378 (1923). . . . . .45-113
Robertson v. Western Virginia Water Auth., 287 Va. 158, 752 S.E.2d 875 (2014) . . . . . .31-2
Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 64 S.E.2d 723 (1951) . . . . . .34-44
Robinson v. Nordquist, 297 Va. 503, 830 S.E.2d 36 (2019) . . . . . .27-6
Robinson v. Ward, 239 Va. 36, 387 S.E.2d 735 (1990). . . . . .48-14; 48-18
Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n, 287 Va. 425, 756 S.E.2d 415 (2014) . . 45-74
Rockingham Mut. Fire Ins. Co. v. Hummel, 219 Va. 803, 250 S.E.2d 774 (1979) . . . . . .47-4

[References are to pages]

Rocky Mount v. Hudson, 244 Va. 271, 421 S.E.2d 407 (1992) . . . . . 46-4; 46-10; 46-24
Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955) . . . . . 15-4
Rogers v. Cassidy, 946 S.W.2d 439 (Tex. Ct. App. 1997). . . . . 37-3
Rogers v. Missouri P. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) . . . . . 21-2–21-4; 21-10
Ropp v. Stevens, 155 Va. 304, 154 S.E. 553 (1930) . 35-20
Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859. . . . . 37-3
Rose v. Jaques, 268 Va. 137, 597 S.E.2d 64 (2004) . 9-8
Rosen v. Greifenberger, 257 Va. 373, 513 S.E.2d 861 (1999) . . . . . 1-4; 1-8; 35-16
Rosenberg v. Mason, 157 Va. 215, 160 S.E. 190 . 37-58
Rosenberg v. Stone, 160 Va. 381, 168 S.E. 436 . 45-128
Rosenberg v. Turner, 124 Va. 769, 98 S.E. 763 (1919). . . . . 45-66; 45-78
Rosenberg, 160 Va. 381, 168 S.E. 436 . . . . . 45-128
Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). . . . . 37-3
Rosser v. Franklin, 47 Va. 1 . . . . . 48-14
Rotella v. Lange, 202 Va. 575, 118 S.E.2d 516 (1961). . . . . 45-32
Rountree v. Rountree, 198 Va. 658, 96 S.E.2d 113 (1957) . . . . . 4-3; 7-4; 10-32; 17-12
Royal v. Commonwealth, 234 Va. 403, 362 S.E.2d 323 (1987) . . . . . 2-30
Royal Indem. Co. v. Hook, 155 Va. 956, 157 S.E. 414 (1931). . . . . 47-12
Royal Indem. Co. v. Tyco Fire Prods., LP, 281 Va. 157, 704 S.E.2d 91 (2011) . . . . . 34-10
Ruffin v. United States Fire Ins. Co., 208 Va. 463, 158 S.E.2d 672 (1968) . . . . . 47-50
Ruhlin v. Samaan, 282 Va. 371, 718 S.E.2d 447 (2011) . . . . . 2-30; 2-34
Runyon v. Geldner, 237 Va. 460, 377 S.E.2d 456 (1989). . . . . 23-14
Rushton v. Mountcastle, 202 Va. 521, 118 S.E.2d 660 (1961). . . . . 10-64
Russ v. Destival, 267 Va. 458, 593 S.E.2d 201 (2004) . . . . . 14-4
Russell v. Branch Motor Express, 237 Va. 20, 375 S.E.2d 722 . . . . . 10-16
Russell v. Commonwealth, 216 Va. 833, 223 S.E.2d 877 (1976) . . . . . 2-24
Russell v. Hammond, 200 Va. 600, 106 S.E.2d 626 (1959). . . . . 10-18
Russo v. White, 241 Va. 23, 400 S.E.2d 160 (1991) . 33-2; 33-10; 33-14
Rutter v. Jones, Blechman, Woltz & Kelly, 264 Va. 310, 568 S.E.2d 693. . . . . 42-11
Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959) . 46-24; 46-32
Ryan v. Maryland Casualty Co., 173 Va. 57, 3 S.E.2d 416 (1939) . . . . . 2-28

## S

S&W Motor Lines, Inc. v. Bayliss, 212 Va. 124, 183 S.E.2d 169. . . . . 2-14
S.H. Kress & Co. v. Musgrove, 153 Va. 348, 149 S.E. 453 . . . . . 36-34
Sabb v. Norfolk & Portsmouth Belt Line R. R. Co., 222 Va. 19, 278 S.E.2d 795 (1981) . . 21-3; 21-6; 21-10; 21-16
Safety Motor Transit Corp. v. Cunningham, 161 Va. 356, 171 S.E. 432 (1933). . . . . 9-20
Sager v. Basham, 241 Va. 227, 401 S.E.2d 676 (1991) . . . . . 45-8; 45-18; 45-40
Sainani v. Belmont Glen Homeowners Ass'n, 297 Va. 714, 831 S.E.2d 662 (2019). . . . . 45-66
Saks Fifth Avenue, Inc. v. James, Ltd., 272 Va. 177, 630 S.E.2d 304, 2006-1 Trade Cas. (CCH) P75277 (2006) . . . . . 9-6; 40-16; 40-20
Sales v. Kecoughtan Hous. Co., 279 Va. 475, 690 S.E.2d 91 (2010). . . . . 24-14; 24-18; 39-28
Sam Finley, Inc. v. Waddell, 207 Va. 602, 151 S.E.2d 347 (1966) . . . . . 26-2; 26-10
Sami v. Varn, 260 Va. 280, 535 S.E.2d 172 (2000) . 35-9; 35-12; 35-22
Samuel v. Hunter's Ex'x, 122 Va. 636, 95 S.E. 399 (1918). . . . . 48-21
Sanchez v. Medicorp Health Sys., 270 Va. 299, 618 S.E.2d 331 (2005). . . . . 8-30; 47-16
Sanders v. Coleman, 97 Va. 690, 34 S.E. 621 (1899). . . . . 45-96
Sanders v. Commonwealth, 282 Va. 154, 711 S.E.2d 213. . . . . 2-16, 2-17
Sanders v. Newsome, 19 S.E.2d 883, 179 Va. 582 (1942). . . . . 14-12
Sands & Co. v. Norvell, 101 S.E. 569, 126 Va. 384 (1919) . . . . . 38-3; 38-16; 38-22; 38-24
Santen v. Tuthill, 265 Va. 492, 578 S.E.2d 788 (2003). . . . . 2-31; 2-34; 36-7
Saulsbury v. Williams, 205 Va. 727, 139 S.E.2d 816 (1965). . . . . 10-110
Saunders v. Bank of Mecklenburg, 112 Va. 443, 71 S.E. 714 (1911) . . . . . 45-42
Saunders v. Bulluck, 208 Va. 551, 159 S.E.2d 820 (1968) . . . . . 2-20
Savage v. Bowen, 103 Va. 540, 49 S.E. 668 (1905) . 48-14
Savage v. Nute, 180 Va. 394, 23 S.E.2d 133 (1942) . 48-11

[References are to pages]

Savage Truck Line v. Traylor, 193 Va. 579, 69 S.E.2d 478 . . . . . 10-114
Sawyer v. Blankenship, 160 Va. 651, 169 S.E. 551 . 14-12
Sawyer v. Comerci, 264 Va. 68, 563 S.E.2d 748 (2002). . .3-12; 5-6; 6-2; 6-4, 6-5; 6-16; 6-18; 9-18; 35-42
Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 . . . . . 31-5
Sayles v. Piccadilly Cafeterias, Inc., 242 Va. 328, 410 S.E.2d 632 (1991) . . . . . 8-10; 8-16
Schaecher v. Bouffault, 290 Va. 83, 772 S.E.2d 589 (2015). .37-2; 37-7; 37-11; 37-13; 37-22; 37-40; 40-10; 40-14
Schickling v. Aspinall, 235 Va. 472, 369 S.E.2d 172 (1988) . . . . . 9-14
Schilling v. Schilling, 280 Va. 146, 695 S.E.2d 181 (2010). . . . . .48-10
Schlimmer v. Poverty Hunt Club, 268 Va. 74, 597 S.E.2d 43 (2004). . . . . 1-8; 2-46
Schmelz Bros. Bankers v. Quinn, 134 Va. 78, 113 S.E. 845 . . . . . 39-18
Schnupp v. Smith, 249 Va. 353, 457 S.E.2d 42 . . 37-32
Scholz v. Standard Acc. Ins. Co., 145 Va. 694, 134 S.E. 728 . . . . . 47-28
School Bd. v. Burley, 225 Va. 376, 302 S.E.2d 53 (1983) . . . . . 45-4
Schuiling v. Harris, 286 Va. 187, 747 S.E.2d 833 (2013). . . . . .45-52; 45-62
Schutt v. Brockwell, 214 Va. 38, 196 S.E.2d 921 (1973) . . . . . . 14-4; 14-8; 14-10; 14-16
Schwartz v. Brownlee, 253 Va. 159, 482 S.E.2d 827 (1997) . . . . . 12-2
Scott v. Chesterman, 117 Va. 584, 85 S.E. 502 . . 45-78
Scott v. Greater Richmond Transit Co., 241 Va. 300, 402 S.E.2d 214 (1991) . . . . . 10-62
Scott v. Scott, 142 Va. 31, 128 S.E. 599 (1925) . 45-104
Scott's Ex'r v. Chesterman, 117 Va. 584, 85 S.E. 502 (1915). . . . . .45-78
Seaboard A. L. Railway v. Tilgham, 237 U.S. 499, 35 S. Ct. 653, 59 L. Ed. 1069 (1915). . . . . .21-18
Seaboard Air Line Ry. Co. v. Crowder, 62 S.E.2d 227, 191 Va. 635 (1950) . . . . . 18-14
Seaboard Fire & Marine Ins. Co. v. Hurst, 186 Va. 21, 41 S.E.2d 495 . . . . . .47-52
Seabolt v. County of Albemarle, 283 Va. 717, 724 S.E.2d 715. . . . . .31-3
Sea-Land Serv., Inc. v. O'Neal, 224 Va. 343, 297 S.E.2d 647, 115 LRRM 4242. . . . . .9-4; 9-7; 45-18
Seaton v. Commonwealth, 42 Va. App. 739, 595 S.E.2d 9 (2004). . . . . .1-3
Seawell v. Carmines, 207 Va. 294, 149 S.E.2d 903 (1966). . . . . .10-98
Select Mgmt. Res., LLC v. Runnymede Corp., 273 Va. 710, 643 S.E.2d 177 (2007). . . . . .24-22
Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 374 S.E.2d 55 (1988). . . .34-2; 35-48
Seward v. American Hardware Co., 161 Va. 610, 171 S.E. 650 . . . . . .45-62
Seward v. New York Life Ins. Co., 154 Va. 154, 152 S.E. 346 (1930) . . . . . .45-38
Seymour v. Goodrich, 80 Va. 303 . . . . . .45-38
Shalimar Dev., Inc. v. FDIC, 257 Va. 565, 515 S.E.2d 120 (1999) . . . . . .43-4; 43-12
Shamblee v. Virginia Transit Co., 204 Va. 591, 132 S.E.2d 712 (1963). . . . . .22-4; 22-12
Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 167 S.E.2d 334 (1969) . . . . . .24-22
Sharp v. Richmond Life Ins. Co., 212 Va. 229, 183 S.E.2d 132 (1971) . . . . . .47-78
Shaw v. Titan Corp., 255 Va. 535, 498 S.E.2d 696 (1998) . . . . . 9-32; 36-34
Shea Realty Corp. v. Page & Taylor, 69 S.E. 327, 111 Va. 490 (1910) . . . . . .43-10; 43-12
Shearin v. Va. Elec. & Power Co., 182 Va. 573, 29 S.E.2d 841 (1944). . . .10-88; 10-92; 10-96; 10-98; 10-102
Sheckler v. Anderson, 182 Va. 701, 29 S.E.2d 867 (1944). . . . . .6-8
Shellman v. Commonwealth, 284 Va. 711, 733 S.E.2d 242 (2012). . . . . .49-4
Shelton v. Mullins, 207 Va. 17, 147 S.E.2d 754 (1966). . . . . .2-30; 2-34
Shenandoah Life Ins. Co. v. French, 236 Va. 427, 373 S.E.2d 718 . . . . . .47-29
Shenandoah Milling Co. v. Phosphate Prods. Corp., 161 Va. 642, 171 S.E. 681 . . . . 45-110; 45-112; 45-134
Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 427 S.E.2d 370 . 37-7; 37-10; 37-18; 37-22; 37-52; 37-58
Shepard v. Capitol Foundry of Va., Inc., 262 Va. 715, 554 S.E.2d 72 (2001) . . . . . 9-8
Shepherd v. Smith, 265 Va. 327, 576 S.E.2d 427 (2003). . . . . .9-8
Shiflett v. M. Timberlake, Inc., 205 Va. 406, 137 S.E.2d 908 (1964). . . . . .6-24
Shipman v. Kruck, 267 Va. 495, 593 S.E.2d 319 (2004) . . . . . 42-8–42-11
Shirley v. Russell, 149 Va. 658, 140 S.E. 816 (1927) . . . . . .46-3
Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005) . . . . . 49-2; 49-14
Shoemaker v. Cake, 83 Va. 1, 1 S.E. 387. . . . .45-106
Shoemaker v. Funkhouser, 299 Va. 471, 856 S.E.2d 174 (2021). . . . . .23-18; 23-20

[References are to pages]

Shumate v. Mitchell, 296 Va. 532, 822 S.E.2d 9 (2018) . . . . . 2-54
Sierra Breeze v. Superior Court, 149 Cal. Rptr. 914, 86 Cal. App. 3d 102 (Cal. Ct. App. 1978) . . . . . 37-3
Silvey v. Johnston, 70 S.E.2d 280, 193 Va. 677 (1952) . . . . . 45-110
Simbeck, Inc. v. Dodd Sisk Whitlock Corp., 257 Va. 53, 508 S.E.2d 601 (1999) . . . . . 40-11; 40-14
Simmers v. Depoy, 212 Va. 447, 184 S.E.2d 776 (1971) . . . . . 7-16; 7-20
Simmons v. Adams, 202 Va. 926, 121 S.E.2d 379 (1961) . . . . . 4-3; 7-4; 9-9; 10-32; 17-12
Simmons v. Craig, 199 Va. 338, 99 S.E.2d 641 (1957) . . . . . 10-60
Simmons v. Miller, 261 Va. 561, 544 S.E.2d 666 (2001) . . . . . 40-2; 40-16; 40-20
Simpson v. Broadway-Manhattan Taxicab Corp., 203 Va. 892, 128 S.E.2d 306 (1962) . . . . . 22-10
Simpson v. Scott, 189 Va. 392, 53 S.E.2d 21 (1949) . 45-8; 45-83
Simpson, 203 Va. 892, 128 S.E.2d 306 . . . . . 22-10
Singer Sewing Mach. Co. v. Ferrell, 132 S.E. 312, 144 Va. 395 (1926) . . . . . 42-14; 42-16
Sink v. Masterson, 191 Va. 618, 61 S.E.2d 863 (1950) . . . . . 10-56
Skinner v. Norfolk & W. R. Co., 145 S.E.2d 170, 206 Va. 649 (1965) . . . . . 18-26
Slate v. Titmus, 238 Va. 557, 385 S.E.2d 590 (1989) . . . . . 48-14, 48-15
Slaughter v. Valleydale Packers, Inc., 198 Va. 339, 94 S.E.2d 260 (1956) . . . . . 37-9; 37-48; 37-52; 37-56
Smalls v. Wright, 241 Va. 52, 399 S.E.2d 805 (1991) . . . . . 37-32
Smith v. Alexandria Arena, Inc., 294 F. Supp. 695 (E.D. Va. 1969) . . . . . 28-12
Smith v. Allstate Ins. Co., 241 Va. 477, 403 S.E.2d 696 (1991) . . . . . 47-76
Smith v. Chilton, 84 Va. 840, 6 S.E. 142 (1888) . 45-38
Smith v. City of Richmond, 184 Va. 40, 34 S.E.2d 371 . . . . . 30-8
Smith v. Clark, 46 S.E.2d 21, 187 Va. 181 (1948) . 10-64
Smith v. Colonial Ins. Co., 258 Va. 30, 515 S.E.2d 775 (1999) . . . . . 47-61
Smith v. Commonwealth, 247 Va. 157, 439 S.E.2d 409, 439 S.E.2d 157 (1994) . . . . . 2-28
Smith v. Farrell, 199 Va. 121, 98 S.E.2d 3 (1957) . 45-28; 45-46; 45-110
Smith v. Grenadier, 203 Va. 740, 127 S.E.2d 107 (1962) . . . . . 8-30; 8-34
Smith v. Kim, 277 Va. 486, 675 S.E.2d 193 . 5-5; 9-22
Smith v. Lamar, 188 S.E.2d 72, 212 Va. 820 (1972) . 11-3; 11-10
Smith v. Landmark Communications, Inc., 246 Va. 149, 431 S.E.2d 306 . . . . . 8-10; 8-20
Smith v. Litten, 256 Va. 573, 507 S.E.2d 77 (1998) . 9-32; 9-34
Smith v. McLaughlin, 289 Va. 241, 769 S.E.2d 7 (2015) . . . . . 5-10; 42-8–42-10; 45-110
Smith v. New Dixie Lines, Inc., 201 Va. 466, 111 S.E.2d 434 ((1959)) . . . . . 10-60
Smith v. Packard, 94 Va. 730, 27 S.E. 586 (1897) . 45-110
Smith v. Phillips, 77 Va. 548 (1883) . . . . . 45-38
Smith v. Pittston Co., 203 Va. 711, 127 S.E.2d 79 (1962) . . . . . 26-2; 26-10
Smith v. Richmond, 184 Va. 40, 34 S.E.2d 371 (1945) . . . . . 30-8
Smith v. Settle, 254 Va. 348, 492 S.E.2d 427 . 11-6; 11-12; 11-14
Smith v. Smith, 112 Va. 205, 70 S.E. 491 (1911) . 48-10
Smith v. Spradlin, 204 Va. 509, 132 S.E.2d 455 (1963) . . . . . 7-16; 7-20; 14-18
Smith v. Tate, 82 Va. 657 (1886) . . . . . 47-12
Smith v. Virginia Elec. & Power Co., 204 Va. 128, 129 S.E.2d 655 . . . . . 2-20; 6-18; 30-4; 30-14
Smith v. Wright, 207 Va. 482, 151 S.E.2d 359 (1966) . . . . . 2-10
Smith, 204 Va. 128, 129 S.E.2d 655 . . . . . 30-14
Smith, 294 F. Supp. 695 . . . . . 28-12
Smithfield Foods, Inc. v. United Food & Commer. Workers Int'l Union, 585 F. Supp. 2d 815, 584 F. Supp. 2d 838 (E.D. Va. 2008) . . . . . 37-7
Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va. 137, 104 S.E. 371 (1920) . . . 3-12; 36-22; 36-24
Snyder v. Commonwealth, 220 Va. 792, 263 S.E.2d 55 (1980) . . . . . 1-9
Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) . . . . . 33-11
Snyder-Falkinham v. Stockburger, 249 Va. 376, 457 S.E.2d 36 (1995) . . . . . 44-2; 44-6
Soble v. Herman, 175 Va. 489, 9 S.E.2d 459 (1940) . 39-10
Sonney, 236 Va. 482, 374 S.E.2d 71 . . . . . 21-22
Sordelett v. Mercer, 185 Va. 823, 40 S.E.2d 289 (1946) . . . . . 47-84
South Hill Motor Co. v. Gordon, 172 Va. 193, 200 S.E. 637 . . . . . 14-8
South Norfolk v. Dail, 47 S.E.2d 405, 187 Va. 495 (1948) . . . . . 32-2
Southeastern Tidewater Opportunity Project v. Bade, 435 S.E.2d 131, 246 Va. 273 (1993) . . . . . 3-14; 37-32
Southern Floors & Acoustics, Inc. v. Max-Yeboah, 267 Va. 682, 594 S.E.2d 908 . 8-6; 8-26; 8-30; 23-14; 24-10; 24-14; 24-18

[References are to pages]

Southern Home Ins. Co. v. Bowers, 157 Va. 686, 161 S.E. 914 . . . . . 47-52
Southern R. Co. v. Abee's Adm'r, 124 Va. 379, 98 S.E. 31 (1919). . . . . 18-34
Southern R. Co. v. Barden, 200 Va. 98, 104 S.E.2d 13 (1958). . . . . 18-32
Southern R. Co. v. Campbell, 172 Va. 311, 1 S.E.2d 255. . . . . 18-6
Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733, 60 S.E. 58 (1908) . . . . . 1-9, 1-10
Southern R. Co. v. Johnson, 151 Va. 345, 146 S.E. 363 . . . . . 18-26
Southern R. Co. v. McMenamin, 113 Va. 121, 73 S.E. 980 (1912) . . . . . 26-2
Southern R. Co. v. Mosby, 112 Va. 169, 70 S.E. 517 (1911). . . . . 41-10
Southern R. Co. v. Thompson, 41 S.E.2d 456, 186 Va. 106 (1947) . . . . . 18-10
Southern R. Co. v. Wilson, 86 S.E.2d 53, 196 Va. 883 (1955) . . . . . 18-6
Southern Ry. Co. v. Abee, 124 Va. 379, 98 S.E. 31 . 18-34
Southern Ry. Co. v. Baptist, 114 Va. 723, 77 S.E. 477 (1913) . . . . . 7-12
Southern Ry. Co. v. Barden, 200 Va. 98, 104 S.E.2d 13. . . . . 18-32
Southern Ry. Co. v. Campbell, 172 Va. 311, 1 S.E.2d 255. . . . . 18-6
Southern Ry. Co. v. Johnson, 151 Va. 345, 146 S.E.2d 363 (1928). . . . . 18-26
Southern Ry. Co. v. Mosby, 112 Va. 169, 70 S.E. 517 . . . . . 41-10
Southern Ry. Co. v. Thompson, 186 Va. 106, 41 S.E.2d 456 . . . . . 18-10
Southern Ry. Co. v. Wilson, 196 Va. 883, 86 S.E.2d 53 . . . . . 18-6
Southers v. Price, 211 Va. 469, 178 S.E.2d 685 (1971) . . . . . 1-7; 10-72
Southwest Virginia Hospitals, Inc. v. Lipps, 193 Va. 191, 68 S.E.2d 82 (1951). . . . . 45-62
Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973). . . . . 34-44
Sparagon v. Native Am. Publishers, 542 N.W.2d 125, 1996 SD 3 (S.D. 1996) . . . . . 37-3
Spectra-4, LLP v. Uniwest Commercial Realty, Inc., 290 Va. 36, 772 S.E.2d 290 (2015) . 45-16; 45-54; 45-56
Speet v. Bacaj, 237 Va. 290, 377 S.E.2d 397 (1989). 35-26
Spence v. American Oil Co., 171 Va. 62, 197 S.E. 468 (1938) . . . . . 5-10
Spence v. Griffin, 236 Va. 21, 372 S.E.2d 595 (1988). . . . . 39-10; 39-14
Spence v. Miller, 197 Va. 477, 90 S.E.2d 131 (1955). . . . . 10-64
Spicer v. Hartford Fire Ins. Co., 171 Va. 428, 199 S.E. 499 (1938) . . . . . 47-18
Spitzer v. Clatterbuck, 202 Va. 1001, 121 S.E.2d 466 (1961). . . . . 41-30
Spotsylvania County School Bd. v. Seaboard Surety Co., 243 Va. 202, 415 S.E.2d 120 (1992) . . 45-82; 45-94
Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 758 S.E.2d 55 (2014). . . . . 45-66
Sroufe v. Waldron, 297 Va. 396, 829 S.E.2d 262 (2019) . . . . . 37-2; 37-13; 37-22; 37-27
St. John v. Thompson, 299 Va. 431, 854 S.E.2d 648 (2021) . . . . . 39-2
St. Louis S. R. Co. v. Dickerson, 470 U.S. 409, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985). . . . . 21-2; 21-24
Standard Ice Co. v. Lynchburg Diamond Ice Factory, 129 Va. 521, 106 S.E. 390 . . . . . 45-70; 45-72
Stanfield v. Peregoy, 245 Va. 339, 429 S.E.2d 11 (1993). . . . . 11-3; 11-6; 31-2
Stanley v. Webber, 260 Va. 90, 531 S.E.2d 311 . . 41-2; 41-6; 41-14; 41-24
Stanley's Cafeteria, 226 Va. 68, 306 S.E.2d 870 . 45-86; 45-90
Stanpark Realty Corp. v. City of Norfolk, 199 Va. 716, 101 S.E.2d 527 (1958) . . . . . 46-6
Staples v. Spence, 19 S.E.2d 69, 179 Va. 359 (1942). . . . . 18-32
State Farm Fire & Cas. Co. v. Mabry, 255 Va. 286, 497 S.E.2d 844. . . . . 42-4
State Farm Fire & Cas. Co. v. Scott, 236 Va. 116, 372 S.E.2d 383 . . . . . 47-56
State Farm Fire & Cas. Co. v. Walton, 244 Va. 498, 423 S.E.2d 188 . . . . . 47-56
State Farm Fire & Casualty Co. v. Scott, 236 Va. 116, 372 S.E.2d 383 (1988) . . . . . 47-56
State Farm Fire & Casualty Co. v. Walton, 244 Va. 498, 423 S.E.2d 188 (1992). . . . . 47-56
State Farm Fire Ins. Co. v. Rakes, 188 Va. 239, 49 S.E.2d 265 (1948) . . . . . 47-44
State Farm Mut. Auto Ins. v. Remley, 270 Va. 209, 618 S.E.2d 316. . . . . 39-6; 39-18; 39-30
State Farm Mut. Auto. Ins. Co. v. Cook, 186 Va. 658, 43 S.E.2d 863 (1947) . . . . . 47-84
State Farm Mut. Auto. Ins. Co. v. Davies, 226 Va. 310, 310 S.E.2d 167 (1983). . . . . 47-57
State Farm Mut. Auto. Ins. Co. v. Douglas, 207 Va. 265, 148 S.E.2d 775 (1966). . . . . 47-56
State Farm Mut. Auto. Ins. Co. v. Floyd, 235 Va. 136, 366 S.E.2d 93 (1988). . . . . 47-88
State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968) . . . . . 2-44; 9-20

[References are to pages]

State Farm Mut. Auto. Ins. Co. v. Geico Indem. Co., 241 Va. 326, 402 S.E.2d 21 (1991) . . . . . 47-85
State Farm Mut. Auto. Ins. Co. v. Kendrick, 254 Va. 206, 491 S.E.2d 286 (1997) . . . . . 9-5
State Farm Mut. Auto. Ins. Co. v. Long, 212 Va. 234, 183 S.E.2d 138 (1971) . . . . . 47-42
State Farm Mut. Auto. Ins. Co. v. Miller, 194 Va. 589, 74 S.E.2d 145 (1953) . . . . . 47-12; 47-24
State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 272 S.E.2d 196 (1980) . . . . . 47-56
State Farm Mut. Auto. Ins. Co. v. Remley, 618 S.E.2d 316, 270 Va. 209 (2005) . . . . . 39-6; 39-18; 39-30
State Farm Mut. Auto. Ins. Co., 209 Va. 266, 163 S.E.2d 181 . . . . . 9-20
State Highway & Transp. Comm'r v. Allmond, 220 Va. 235, 257 S.E.2d 832 (1979) . . . . 46-14; 46-20; 46-24; 46-32
State Highway & Transp. Comm'r v. Carter, 216 Va. 639, 222 S.E.2d 776 (1976) . . . . . 46-36
State Highway & Transp. Comm'r v. Dennison, 231 Va. 239, 343 S.E.2d 324 . . . . . 46-28
State Highway & Transp. Comm'r v. Parr, 217 Va. 522, 230 S.E.2d 253 (1976) . . . . . 46-24; 46-38
State Highway Comm'r v. Allmond, 220 Va. 235, 257 S.E.2d 832 . . . . . 46-14
State Highway Comm'r v. Crockett, 203 Va. 796, 127 S.E.2d 354 (1962) . . . . . 46-18; 46-24
State Highway Comm'r v. Foster, 216 Va. 745, 222 S.E.2d 780 (1976) . . . . . 46-36
State Highway Comm'r v. Kreger, 128 Va. 203, 105 S.E. 217 (1920) . . . . . 46-6
State Highway Comm'r v. Reynolds, 206 Va. 785, 146 S.E.2d 261 (1966) . . . . . 46-18; 46-24
State Hwy. & Transp. Comm'r v. Allmond, 220 Va. 235, 257 S.E.2d 832 . . . . . 46-20; 46-24; 46-32
State Hwy. & Transp. Comm'r v. Carter, 216 Va. 639, 222 S.E.2d 776 . . . . . 46-36
State Hwy. & Transp. Comm'r v. Dennison, 231 Va. 239, 343 S.E.2d 324 (1986) . . . . . 46-14; 46-28
State Hwy. & Transp. Comm'r v. Parr, 217 Va. 522, 230 S.E.2d 253 . . . . . 46-24; 46-34; 46-38
State Hwy. Comm'r v. Crockett, 203 Va. 796, 127 S.E.2d 354 . . . . . 46-18; 46-24
State Hwy. Comm'r v. Foster, 216 Va. 745, 222 S.E.2d 780 . . . . . 46-36
State Hwy. Comm'r v. Reynolds, 206 Va. 785, 146 S.E.2d 261 . . . . . 46-18; 46-24
State Realty Co. v. Wood, 190 Va. 321, 57 S.E.2d 102 (1950) . . . . . 43-6
Station # 2, LLC v. Lynch, 695 S.E.2d 537, 280 Va. 166 (2010) . . . . . 40-20; 45-106
Staunton v. Aldhizer, 211 Va. 658, 179 S.E.2d 485 (1971) . . . . . 46-24
Sternheimer v. Sternheimer, 208 Va. 89, 155 S.E.2d 41 (1967) . . . . . 45-82
Stevens v. Bangor & Aroostook R.R., 97 F.3d 594 (1st Cir. 1996) . . . . . 21-14
Stevens v. Mirakian, 177 Va. 123, 12 S.E.2d 780 (1941) . . . . . 1-12
Steward v. Holland Family Props., LLC, 284 Va. 282, 726 S.E.2d 251 (2012) . . . . . 24-14; 24-18; 34-56
Stewart v. Commonwealth, 10 Va. App. 563, 394 S.E.2d 509 (1990) . . . . . 1-8
Stewart v. Fugate, 212 Va. 689, 187 S.E.2d 156 (1972) . . . . . 46-6
Stockbridge v. Gemini Air Cargo, Inc., 269 Va. 609, 611 S.E.2d 600 (2005) . . . . . 45-86
Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984) . . . . . 1-8
Stoneburner v. Motley, 95 Va. 784, 30 S.E. 364 (1898) . . . . . 45-40
Stoner v. Robertson, 207 Va. 633, 151 S.E.2d 363 (1966) . . . . . 6-26
Stony Creek Lumber Co. v. Fields & Co., 45 S.E. 797, 102 Va. 1 (1903) . . . . . 45-124
Stout v. Bartholomew, 261 Va. 547, 544 S.E.2d 653 (2001) . . . . . 29-10; 29-12
Stover v. Norfolk & W. Ry., 249 Va. 192, 455 S.E.2d 238 (1995) . . . . . 21-10
Stratton v. Bergman, 169 Va. 249, 192 S.E. 813 (1937) . . . . . 10-32; 17-12
Straughan v. Nash, 215 Va. 627, 212 S.E.2d 280 (1975) . . . . . 14-4; 14-16
Street v. Street, 25 Va. App. 380, 488 S.E.2d 665 (1997) . . . . . 2-16
Stuart Circle Hosp. Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153 . . . . . 35-46
Stubbs v. Cowden, 179 Va. 190, 18 S.E.2d 275 (1942) . . . . . 37-48
Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) . . . . . 38-6
Sturdivant v. Birchett, 51 Va. 67 (1853) . . . . . 48-14
Subaru of Am. v. Peters, 256 Va. 43, 500 S.E.2d 803 (1998) . . . . . 34-64
Suffolk v. Hewitt, 226 Va. 20, 307 S.E.2d 444 (1983) . . . . . 23-12; 23-14; 23-28
Sugarland Run Homeowners Ass'n v. Halfmann, 260 Va. 366, 535 S.E.2d 469 (2000) . . . . . 5-4
Sullivan v. Robertson Drug Co., 273 Va. 84, 639 S.E.2d 250 (2007) . . . . . 4-16; 4-20; 9-15
Sullivan v. Sutherland, 206 Va. 377, 143 S.E.2d 920 (1965) . . . . . 23-22
Summers v. Syptak, 293 Va. 606, 801 S.E.2d 422 (2017) . . . . . 35-3; 35-22

[References are to pages]

Sumner v. Smith, 220 Va. 222, 257 S.E.2d 825 (1979) . . . . . 9-8
Sun Life Assurance Co. v. Bailey, 101 Va. 443, 44 S.E. 692 (1903) . . . . . 1-11
Sunrise Continuing Care, LLC v. Wright, 277 Va. 148, 671 S.E.2d 132 (2009) . . . . . 9-12; 45-110
SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008) . . . 33-2; 33-10; 33-14; 39-6; 39-10, 39-11; 39-18; 39-40; 39-42
Surf Realty Corp. v. Standing, 195 Va. 431, 78 S.E.2d 901 (1953) . . . . . 35-48
Sutherland v. Sutherland, 192 Va. 764, 66 S.E.2d 537 (1951) . . . . . 48-24
Sutherland & Co. v. Gibson, 117 Va. 840, 86 S.E. 108 . . . . . 45-78
Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S.E. 192 (1931) . . . . . 47-56
Sweely Holdings, LLC v. R SunTrust Bank, 296 Va. 367, 820 S.E.2d 596 (2018) . . . . . 45-106
Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959) . . . . . 34-32
Swisher v. Swisher, 223 Va. 499, 290 S.E.2d 856 (1982) . . . . . 10-92
Syed v. Zh Techs., Inc., 280 Va. 58, 694 S.E.2d 625 (2010) . . . . . 9-32; 40-16; 40-20
Sykes v. Bayer Pharms. Corp., 548 F. Supp. 2d 208 (E.D. Va. 2008) . . . . . 34-54
Sykes v. Brown, 156 Va. 881, 159 S.E. 202 (1931) . 9-4, 9-5
Sykes v. Langley Cabs, Inc., 211 Va. 202, 176 S.E.2d 417 (1970) . . . . . 22-4; 22-18

## T

T.E. Ritter Corp. v. Rose, 200 Va. 736, 107 S.E.2d 479 (1959) . . . . . 8-30
T. Musgrove Constr. Co. v. Young, 298 Va. 480, 840 S.E.2d 337 (2020) . . . . . 45-113; 45-132
Tabb v. Willis, 155 Va. 836, 156 S.E. 556 (1931) . . 45-100; 48-20, 48-21
Taboada v. Daly Seven, Inc., 271 Va. 313, 626 S.E.2d 428 . . . . . 23-14; 24-10; 25-6
Taboada v. Daly Seven, Inc., 273 Va. 269, 641 S.E.2d 68 (2007) . . . . . 25-6
Taboada v. Daly Seven, Inc., 626 S.E.2d 428, 271 Va. 313 (2006) . . . . . 23-14
Taco Bell of America, Inc. v. Commonwealth Transp. Comm'r, 282 Va. 127, 710 S.E.2d 478 (2011) . 46-21
Tague v. Citizens for Law & Order, Inc., 142 Cal. Rptr. 689, 75 Cal. App. 3d Supp. 16 . . . . . 37-3
Tahboub v. Thiagarajah, 298 Va. 366, 837 S.E.2d 752 (2020) . . . . . 5-5; 35-22
Talbot v. City of Norfolk, 158 Va. 387, 163 S.E. 100 . . . . . 46-18; 46-21
Talley v. Danek Med., Inc., 179 F.3d 154 (4th Cir. 1999) . . . . . 34-50
Tancil v. Seaton, 69 Va. 601 . . . . . 28-10
Tanner v. Life Ins. Co., 217 Va. 218, 227 S.E.2d 693 (1976) . . . . . 47-66; 47-94
Tashman v. Gibbs, 263 Va. 65, 556 S.E.2d 772 (2002) . . . . . 35-32
Tasker v. Commonwealth, 202 Va. 1019, 121 S.E.2d 459 (1961) . . . . . 2-38
Tate v. Chumbley, 190 Va. 480, 57 S.E.2d 151 (1950) . . . . . 48-20
Tate v. Colony House Builders, Inc., 257 Va. 78, 508 S.E.2d 597 . . . . . 39-10
Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938) . . . 29-2; 29-6
Tate v. Rice, 227 Va. 341, 315 S.E.2d 385 (1984) . 23-30
Tate v. Tate, 75 Va. 522 . . . . . 45-62
Tavoulareas v. Piro, 817 F.2d 762, 260 U.S. App. D.C. 39 (D.C. Cir. 1987) . . . . . 37-6
Taylor v. City of Charlottesville, 240 Va. 367, 397 S.E.2d 832 ((1990)) . . . . . 26-6; 31-3; 32-7
Taylor v. Grace, 166 Va. 138, 184 S.E. 211 (1936) . 37-11
Taylor v. Mobil Corp., 248 Va. 101, 444 S.E.2d 705 (1994) . . . . . 2-54
Taylor v. Sanders, 233 Va. 73, 353 S.E.2d 745 . 45-124
Taylor v. Virginia Constr. Corp., 209 Va. 76, 161 S.E.2d 732 (1968) . . . . . 24-10
Taylor Thiemann & Aitken v. Hayes, 244 Va. 198, 418 S.E.2d 897 . . . . . 45-12
Tazewell Oil Co. v. United Virginia Bank/Crestar Bank, 413 S.E.2d 611, 243 Va. 94 (1992) . . . 40-16; 40-20
Tazewell Supply Co. v. Turner, 189 S.E.2d 347, 213 Va. 93 (1972) . . . . . 23-12; 23-14
TechDyn Sys. Corp. v. Whittaker Corp, 245 Va. 291, 427 S.E.2d 334 (1993) . . . . . 9-12; 45-116
Ted Lansing Supply Co. v. Royal Alum. & Constr. Corp., 221 Va. 1139, 277 S.E.2d 228 . . . . . 45-56; 45-132
Tellis v. Traynham, 195 Va. 447, 78 S.E.2d 581 (1953) . . . . . 6-24
Temple v. Ellington, 177 Va. 134, 12 S.E.2d 826 (1941) . . . . . 10-96; 10-98
Temple v. Jones, Son & Co., 179 Va. 286, 19 S.E.2d 57 (1942) . . . . . 39-34
Temple v. Moses, 175 Va. 320, 8 S.E.2d 262 (1940) . 10-96; 10-98
Temple v. Temple, 11 Va. 476 (1807) . . . . . 48-20
Tennent v. Union Mut. Life Ins. Co., 150 Va. 548, 143 S.E. 705 (1928) . . . . . 47-22
Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) . . . . . 36-18
Terminal Cars, Inc. v. Wagner, 205 Va. 214, 135 S.E.2d 802 (1964) . . . . . 17-2; 22-4

[References are to pages]

Terminiello v. Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 . . . . . .37-3
Terry v. City of Richmond, 94 Va. 537, 27 S.E. 429 (1897) . . . . . .31-5
Terry v. Fagan, 209 Va. 642, 166 S.E.2d 254 (1969) . 4-26; 10-41
Thalhimer Bros., Inc. v. Casci, 160 Va. 439, 168 S.E. 433 (1933). . . . . .23-28
Tharpe v. Saunders, 285 Va. 476, 737 S.E.2d 890 (2013) . . . . . .37-2; 37-7; 37-11; 37-18
Thibodeau v. Vandermark, 234 Va. 15, 360 S.E.2d 171 (1987) . . . . . .7-4; 7-6; 10-32
Thomas v. Settle, 247 Va. 15, 439 S.E.2d 360 (1994).5-4; 6-14; 10-8; 10-38; 10-104
Thomas v. Snow, 162 Va. 654, 174 S.E. 837 (1934) . 1-11, 1-12; 4-22; 4-30; 6-18; 6-20
Thomas v. Turner's Adm'r, 87 Va. 1, 12 S.E. 149 (1890). . . . . .42-20
Thomas, 258 Va. 516, 522 S.E.2d 620 . . . . . .21-18
Thomas P. Harkins, Inc. v. Reynolds Associates, 221 Va. 1128, 277 S.E.2d 222 (1981). . . . . .45-116
Thomason v. Carlton, 221 Va. 845, 276 S.E.2d 171 (1981). . . . . .48-20
Thompkins v. Randall, 153 Va. 530, 150 S.E. 249 (1929). . . . . .48-18
Thompson v. Royall, 163 Va. 492, 175 S.E. 748 (1934). . . . . .48-24
Thompson v. Skate Am., Inc., 261 Va. 121, 540 S.E.2d 123 (2001). . . . . .7-10; 23-14; 25-6
Thornton v. Glazer, 271 Va. 566, 628 S.E.2d 327 (2006) . . . . . .2-14
Thorsen v. Richmond SPCA, 292 Va. 257, 786 S.E.2d 453 (2016) . . . . . .42-10
Thrasher v. Thrasher, 210 Va. 624, 172 S.E.2d 771 (1970). . . . . .47-48
301 Dahlgren Ltd. Partnership v. Bd. of Supervisors of King George County, 240 Va. 200, 396 S.E.2d 651 (1990). . . . . .45-124
Thurmond v. Prince William Prof'l Baseball Club, Inc., 265 Va. 59, 574 S.E.2d 246 (2003) . . . . 6-26; 6-30
Thurston Metals & Supply Co. v. Taylor, 230 Va. 475, 339 S.E.2d 538 . . . . . .44-3
Tidewater Stevedore Co. v. Lindsay, 116 S.E. 377, 136 Va. 88 (1923) . . . . . .28-6
Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958). . . . . .45-86
Tiller v. Atlantic C. L. R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943). . . . . .21-3; 21-8; 21-16
Tiller v. Norfolk & W. R. Co., 190 Va. 605, 58 S.E.2d 45 (1950) . . . . . .19-4
Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). . . . . .37-3; 37-6; 37-22
Time Ins. Co. v. Bishop, 245 Va. 48, 425 S.E.2d 489 (1993). . . . . .47-60; 47-64
Tingler v. Graystone Homes, Inc., 298 Va. 63, 834 S.E.2d 244 (2019). . . . . .8-30; 45-10
Titcomb v. Wyant, 1 Va. App. 31, 333 S.E.2d 82 (1985) . . . . . .2-58
Todd v. Sykes, 97 Va. 143, 33 S.E. 517 . . . . . .39-34
Todt v. Shaw, 223 Va. 123, 286 S.E.2d 211 (1982) . 9-5; 9-8; 10-8; 10-18
Tolbert v. Gillespie, 195 Va. 647, 79 S.E.2d 670 (1954). . . . . .10-52
Toler v. Commonwealth, 188 Va. 774, 51 S.E.2d 210 (1949) . . . . . .2-28
Torkie-Tork v. Wyeth, 757 F. Supp. 2d 567 (E.D. Va. 2010). . . . . .34-54
Town of Big Stone Gap v. Johnson, 184 Va. 375, 35 S.E.2d 71 (1945) . . . . . .4-22; 31-3
Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748. . . . . .32-2
Town of Galax v. Waugh, 143 Va. 213, 129 S.E. 504 (1925) . . . . . .46-3; 46-32
Town of Hillsville v. Nester, 215 Va. 4, 205 S.E.2d 398 (1974). . . . . .32-12; 32-18
Town of Rocky Mount v. Hudson, 244 Va. 271, 421 S.E.2d 407 . . . . . .46-10; 46-24
Town of Vinton v. City of Roanoke, 195 Va. 881, 80 S.E.2d 608 . . . . . .45-50
Town of Virginia Beach v. Starr, 194 Va. 34, 72 S.E.2d 239 (1952) . . . . . .32-12; 32-18
Townes v. Commonwealth, 269 Va. 234, 609 S.E.2d 1 (2005) . . . . . .49-2
Trail v. White, 221 Va. 932, 275 S.E.2d 617 (1981). 10-26
TransiLift Equip., Ltd. v. Cunningham, 234 Va. 84, 360 S.E.2d 183 (1987). . . . . .2-21
Transportation Comm'r v. DuVal, 238 Va. 679, 385 S.E.2d 605. . . . . .46-8
Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 254 S.E.2d 62 (1979). . . . . .32-6
TravCo Ins. Co. v. Ward, 284 Va. 547, 736 S.E.2d 321 (2012). . . . . .47-76
Travelers Indem. Co. v. Obenshain, 219 Va. 44, 245 S.E.2d 247 (1978) . . . . . .47-66
Travelers Ins. Co. v. Brinkley, 166 Va. 147, 184 S.E. 225 (1936). . . . . .47-72
Travelers Prop. Cas. Co. of Am. v. Ely, 276 Va. 339, 666 S.E.2d 523 (2008) . . . . . .47-36
Travis v. Bulifant, 226 Va. 1, 306 S.E.2d 865 (1983). 2-20
Trimyer v. Norfolk Tallow Co., 66 S.E.2d 441, 192 Va. 776 (1951) . . . . . .30-14

[References are to pages]

Tri-State Coach Corp. v. Stidham, 191 Va. 790, 62 S.E.2d 894 (1951). . . . . .22-4; 22-8; 22-18

Tri-State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948). . . . . .8-16; 8-22; 36-34

Tronfeld v. Nationwide Mut. Ins. Co., 272 Va. 709, 636 S.E.2d 447 (2006). . . . .37-2; 37-11; 37-18; 37-27

Trout v. Commonwealth Transp. Comm'r, 241 Va. 69, 400 S.E.2d 172 (1991) . . . . . .46-3

Tucker v. Calvert, 10 Va. 90 (1806) . . . . . .48-18

Tucker v. Life Ins. Co., 228 Va. 55, 321 S.E.2d 78 (1984). . . . . .47-68

Tucker v. Sandidge, 85 Va. 546, 8 S.E. 650 (1888) . 48-21

Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984). . . . . .1-8; 2-58

Tuomala v. Regent Univ., 252 Va. 368, 477 S.E.2d 501 (1996). . . . . .45-52

Turk v. Martin, 124 Va. 103, 97 S.E. 351 (1918). .9-34

Turman v. Commonwealth, 276 Va. 558, 667 S.E.2d 767 (2008). . . . . .1-8

Turner v. Caplan, 268 Va. 122, 596 S.E.2d 525 ((2004)) . . . . . .26-6

Turner v. Lotts, 244 Va. 554, 422 S.E.2d 765 (1992) . 7-10

Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975). . . . . .34-20; 34-44; 34-62

Turner v. Norfolk S. R. Co., 205 Va. 691, 139 S.E.2d 68 (1964). . . . . .19-6; 19-8

Turner v. Reed, 258 Va. 406, 518 S.E.2d 832 (1999). . . . . .45-72

Tweedy v. J.C. Penney Co., 216 Va. 596, 221 S.E.2d 152 .37-12; 37-36; 38-18; 38-20; 41-2; 41-10; 41-14; 41-18; 41-26; 41-28

Twin Lakes Mfg. Co. v. Coffey, 222 Va. 467, 281 S.E.2d 864 (1981). . . . . .34-40; 45-112

Twohy v. Harris, 194 Va. 69, 72 S.E.2d 329 (1952) . 45-50

Tyler v. City of Richmond, 168 Va. 308, 191 S.E. 625 . . . . . .32-12; 32-16

## U

Ulloa v. QSP, Inc., 271 Va. 72, 624 S.E.2d 43 (2006). . . . . .40-16; 40-20

Umberger v. Koop, 194 Va. 123, 72 S.E.2d 370 (1952). . . . . .10-86

Unger v. Rackley, 205 Va. 520, 138 S.E.2d 1 (1964). . . . . .10-66

Union Trust Corp. v. Fugate, 172 Va. 82, 200 S.E. 624 . . . . . .39-40

Unit Owners Ass'n v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982). . . . . .26-6

United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Humphreys, 203 Va. 781, 127 S.E.2d 98, 51 LRRM 2678 . . . . . .8-14

United Cigarette Mach. Co. v. Brown, 89 S.E. 850, 119 Va. 813 (1916) . . . . . .45-124

United Dentists v. Bryan, 158 Va. 880, 164 S.E. 554 (1932) . . . . . .35-8; 35-22

United Masonry, Inc. v. Riggs Nat'l Bank, 233 Va. 476, 357 S.E.2d 509. . . . . .45-18

United States Cigarette Mach. Co. v. Brown, 119 Va. 813, 89 S.E. 850. . . . . .45-124

United States ex rel. Wilhelm v. Chain, 300 U.S. 31, 57 S. Ct. 394, 81 L. Ed. 487 (1937). . . . . .45-20; 45-34

United States Fidelity & Guaranty Co. v. Haywood, 211 Va. 394, 177 S.E.2d 530 (1970). . . . . .47-60

United States Life Ins. Co. v. Mason, 214 Va. 328, 200 S.E.2d 516 (1973) . . . . . .47-76

Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 699 S.E.2d 223 (2010). . . . . .45-62

Upper Occoquan Sewage Auth. v. Blake Constr. Co., 275 Va. 41, 655 S.E.2d 10 (2008) . . . . . .9-7

Upton v. Hall, 225 Va. 168, 300 S.E.2d 777 (1983) . 45-44

Upton & Walker v. R.D. Holloway & Co., 126 Va. 657, 102 S.E. 54. . . . . .45-86

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). . . . . .21-8

U-Run-It Co. v. Merryman, 154 Va. 467, 153 S.E.2d 664 . . . . . .28-14

Utica Mut. Ins. Co. v. National Indem. Co., 210 Va. 769, 173 S.E.2d 855. . . . . .47-48

Utica Mut. Ins. Co. v. Travelers Indem. Co., 223 Va. 145, 286 S.E.2d 225 (1982). . . . . .47-70

## V

V.N. Green & Co. v. Thomas, 205 Va. 903, 140 S.E.2d 635. . . . . .26-2

Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 520 S.E.2d 164. . . . . .6-4; 6-12; 6-14; 6-30

Va. Elec. & Power Co. v. Hylton, 292 Va. 92, 787 S.E.2d 106 . . . . . .46-24, 46-25

Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth., 270 Va. 309, 618 S.E.2d 323 (2005). . . . . .45-46

Va. Fin. Assocs. v. ITT Hartford Group, Inc., 585 S.E.2d 789, 266 Va. 177 (2003). . . . . .45-132

Va. Fire & Marine Ins. Co. v. J.I. Case Threshing Mach. Co., 107 Va. 588, 59 S.E. 369 (1907). . . . . .47-61

Va. Highlands Airport Auth. v. Singleton Auto Parts, Inc., 277 Va. 158, 670 S.E.2d 734 (2009). . . . . .46-8

Va. Home for Boys & Girls v. Phillips, 279 Va. 279, 688 S.E.2d 284 (2010) . . . . . .48-3; 48-6

[References are to pages]

Va. Polytechnic Inst. & State Univ., 267 Va. 642, 595 S.E.2d 1 . . . . . 45-86; 45-120
Vahabzadeh v. Mooney, 241 Va. 47, 399 S.E.2d 803 (1991) . . . . . 45-83
Vahdat v. Holland, 274 Va. 417, 649 S.E.2d 691 (2007) . . . . . 7-4, 7-5
Valjar, Inc. v. Maritime Terminals, Inc., 220 Va. 1015, 265 S.E.2d 734 (1980) . . . . . 45-3; 45-29
Van Buren v. Simmons, 235 Va. 46, 365 S.E.2d 746 (1988) . . . . . 10-52; 10-98
Van Collom v. Johnson, 228 Va. 103, 319 S.E.2d 745 (1984) . . . . . 6-26, 6-27
Van Dam v. Gay, 280 Va. 457, 699 S.E.2d 480 (2010) . . . . . 42-10
Van Deusen v. Snead, 247 Va. 324, 441 S.E.2d 207 (1994) . . . . . 39-10; 39-24; 43-2
Van Duyn v. Matthews, 24 S.E.2d 442, 181 Va. 256 (1943) . . . . . 34-10
VanBuren v. Grubb, 284 Va. 584, 733 S.E.2d 919 (2012) . . . . . 8-8; 8-22
Vann v. Harden, 187 Va. 555, 47 S.E.2d 314 (1948) . 35-16; 35-18; 35-20
Vasquez v. Mabini, 269 Va. 155, 606 S.E.2d 809 (2005) . . . . . 9-6; 9-40
Vaughan v. Mayo Milling Co., 127 Va. 148, 102 S.E. 597 (1920) . . . . . 24-22
Vaughn v. Shank, 248 Va. 224, 445 S.E.2d 127 (1994) . . . . . 2-54
Veale v. Norfolk & Western Ry. Co., 205 Va. 822, 139 S.E.2d 797 (1965) . . . . . 20-2; 20-4; 20-6
Vega v. Chattan Assocs., 246 Va. 196, 435 S.E.2d 142 (1993) . . . . . 45-62
Veilleux v. Merrill Lynch Relocation Management, Inc., 226 Va. 440, 309 S.E.2d 595 (1983) . . . . . 45-42
Velocity Express Mid-Atlantic, Inc. v. Hugen, 266 Va. 188, 585 S.E.2d 557 (2003) . . . . . 7-4
Vern Sims Ford, Inc. v. Hagel, 713 P.2d 736, 42 Wn. App. 675 (Wash. Ct. App. 1986) . . . . . 37-3
Vick v. Siegel, 191 Va. 731, 62 S.E.2d 899 (1951) . 45-104
Video Zone, Inc. v. KF&F Props., L.C., 267 Va. 621, 594 S.E.2d 921 (2004) . . . . . 45-52; 45-63; 45-74
Viers v. Baker, 298 Va. 553, 841 S.E.2d 857 (2020) . 33-10; 33-14; 37-12
Vilseck v. Campbell, 242 Va. 10, 405 S.E.2d 614 (1991) . . . . . 9-8
Vinton v. Roanoke, 195 Va. 881, 80 S.E.2d 608 (1954) . . . . . 45-50
Virginia & Md. R. Co. v. White, 228 Va. 140, 319 S.E.2d 755 (1984) . . . . . 10-8; 15-4; 18-10
Virginia Auto Mut. Ins. Co. v. Brillhart, 187 Va. 336, 46 S.E.2d 377 (1948) . . . . . 47-12; 47-24; 47-44
Virginia Beach v. Murphy, 389 S.E.2d 462, 239 Va. 353 (1990) . . . . . 26-6
Virginia Beach v. Roman, 201 Va. 879, 114 S.E.2d 749 (1960) . . . . . 31-4; 32-16
Virginia Beach v. Starr, 194 Va. 34, 72 S.E.2d 239 (1952) . . . . . 32-18
Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 . . . . . 31-2; 31-5
Virginia Concrete Co. v. Board of Sup'rs, 197 Va. 821, 91 S.E.2d 415 (1956) . . . . . 42-14
Virginia Elec. & Power Co., 196 Va. 555, 84 S.E.2d 735 . . . . . 46-3
Virginia Elec. & Power Co. v. Daniel, 202 Va. 731, 119 S.E.2d 246 (1961) . . . . . 30-10
Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 520 S.E.2d 164 . . 1-3; 6-4; 6-12; 6-14; 6-30; 9-8; 23-22; 30-4; 30-8
Virginia Elec. & Power Co. v. Hampton Redev. & Hous. Auth., 217 Va. 30, 225 S.E.2d 364 (1976) . . . 31-4
Virginia Elec. & Power Co. v. Lowry, 166 Va. 207, 184 S.E. 177 . . . . . 22-4
Virginia Elec. & Power Co. v. Mabin, 203 Va. 490, 125 S.E.2d 145 . . . . . 2-20
Virginia Elec. & Power Co. v. Marks, 195 Va. 468, 78 S.E.2d 677 . 46-8; 46-10; 46-14; 46-24; 46-40; 46-42
Virginia Elec. & Power Co. v. N. Virginia Reg'l Park Auth., 270 Va. 309, 618 S.E.2d 323 . . . . . 45-46
Virginia Elec. & Power Co. v. Pickett, 197 Va. 269, 89 S.E.2d 76 . . . . . 46-36; 46-40
Virginia Elec. & Power Co. v. Webb, 196 Va. 555, 84 S.E.2d 735 (1954) . . . . . 46-3
Virginia Elec. & Power Co. v. Winesett, 225 Va. 459, 303 S.E.2d 868 . . . . . 6-30; 30-14
Virginia Elec. & Power Co. v. Wynne, 149 Va. 882, 141 S.E. 829 . . . . . 41-14
Virginia Electric & Power Co. v. Lowry, 166 Va. 207, 184 S.E. 177 (1936) . . . . . 22-4
Virginia Electric & Power Co. v. Mabin, 203 Va. 490, 125 S.E.2d 145 (1962) . . . . . 2-20
Virginia Electric & Power Co. v. Marks, 195 Va. 468, 78 S.E.2d 677 (1953) . . . . . 46-8; 46-24; 46-40; 46-42
Virginia Electric & Power Co. v. Pickett, 197 Va. 269, 89 S.E.2d 76 (1955) . . . . . 46-36; 46-40
Virginia Electric & Power Co. v. Winesett, 225 Va. 459, 303 S.E.2d 868 (1983) . . . . . 6-20; 6-30
Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S.E. 829 (1928) . . . . . 41-14
Virginia Farm Bureau Mut. Ins. Co. v. Appalachian Power Co., 228 Va. 72, 321 S.E.2d 84 (1984) . 47-84
Virginia Farm Bureau Mut. Ins. Co. v. Simpkins, 217 Va. 611, 231 S.E.2d 226 (1977) . . . . . 14-8

[References are to pages]

Virginia Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75, 677 S.E.2d 299 (2009). . . . . .47-42
Virginia Fin. Assocs., Inc. v. ITT Hartford Group, Inc., 266 Va. 177, 585 S.E.2d 789. . . . . .45-132
Virginia Fire & Marine Ins. Co. v. Lennon, 140 Va. 766, 125 S.E. 801 (1924). . . . . .47-61
Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S.E.2d 463 (1904). . .47-18; 47-44; 47-50
Virginia Hardwood Lumber Co. v. Hughes, 140 Va. 249, 124 S.E. 283 (1924). . . . . .45-26
Virginia Home for Boys & Girls v. Phillips, 279 Va. 279, 688 S.E.2d 284 (2010). . . . . .2-54; 48-3; 48-6
Virginia Iron, Coal & Coke Co. v. Graham, 98 S.E. 659, 124 Va. 692 (1919) . . . . . 45-96
Virginia Iron, Coal & Coke Co. v. Odle's Adm'r, 105 S.E. 107, 128 Va. 280 (1920). . . . . .8-2
Virginia Nat'l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979). . . . . .48-11
Virginia Real Estate Com. v. Bias, 226 Va. 264, 308 S.E.2d 123 (1983). . . . . .43-22; 43-24
Virginia Ry. & Power Co. v. Arnold, 121 Va. 204, 92 S.E. 925. . . . . .22-16
Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 133 S.E. 776 . . . . . 1-3
Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917). . . . . .8-36; 8-40; 28-14
Virginia Ry. & Power Co. v. Hubbard, 120 Va. 664, 91 S.E. 618 . . . . . 22-12
Virginia Ry. & Power Co. v. Klaff, 123 Va. 260, 96 S.E. 244. . . . . .41-6
Virginia Ry. & Power Co. v. McDemmick, 117 Va. 862, 86 S.E. 744. . . . . .22-12
Virginia Transit Co. v. Durham, 190 Va. 979, 59 S.E.2d 58 (1950). . . . . .7-4, 7-5
Virginia Transit Co. v. Schain, 205 Va. 373, 137 S.E.2d 22 (1964). . . . . .27-12
Virginia Transit Co. v. Simmons, 198 Va. 122, 92 S.E.2d 291 (1956) . . . . . 8-36; 8-40
Virginia Transit Co. v. Tidd, 194 Va. 418, 73 S.E.2d 405 (1952) . . . . . 2-46; 11-16
Virginia-Carolina Elec. Works v. Cooper, 192 Va. 78, 63 S.E.2d 717 (1951). . . . . .44-10
Virginian R. Co. v. Craighead, 68 S.E.2d 647, 193 Va. 300 (1952). . . . . .18-26
Virginian R. Co. v. London., 114 Va. 334, 76 S.E. 306. . . . . .26-6
Virginian Ry. Co. v. Craighead, 193 Va. 300, 68 S.E.2d 647. . . . . .18-26
Virginian Ry. Co. v. London, 114 Va. 334, 76 S.E. 306 (1912). . . . . .26-6
Voight v. Reber, 187 Va. 157, 46 S.E.2d 15 (1948).10-8
Volpe v. City of Lexington, 281 Va. 630, 708 S.E.2d 824 (2011). . . . . .23-14
Volvo White Truck Corp. v. Vineyard, 239 Va. 87, 387 S.E.2d 763 ((1990)) . 28-6; 28-16; 28-18; 28-20; 28-22
Von Lubowiecki v. Donnell, 235 Va. 131, 366 S.E.2d 90. . . . . .14-16
Von Roy v. Whitescarver, 197 Va. 384, 89 S.E.2d 346 (1955). . . . . .4-16; 4-20; 10-64
Votsis v. Ward's Coffee Shop, Inc., 217 Va. 652, 231 S.E.2d 236. . . . . .32-6; 32-14
Vought v. Jones, 205 Va. 719, 139 S.E.2d 810 (1965). . . . . .10-110; 23-22
Vuich v. Great E. Resort Corp., 281 Va. 240, 704 S.E.2d 377 (2011). . . . . .22-5

## W

W.F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc., 203 Va. 259, 123 S.E.2d 377 . . . . . 45-72
W.T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906 (1928) . . . . . 38-6; 38-24; 38-26
Wackenhut Applied Technologies Center, Inc. v. Sygnetron Protection Systems, Inc., 979 F.2d 980 (4th Cir. 1992) . . . . . .9-35
Waddy v. Grimes, 154 Va. 615, 153 S.E. 807 (1930). . . . . .45-100
Wagman v. Boccheciampe, 206 Va. 412, 143 S.E.2d 907 (1965). . . . . .24-10
Wagoner v. Benson, 256 Va. 260, 505 S.E.2d 188 (1998) . . . . . .31-4
Wagoner v. Commonwealth, 289 Va. 476, 770 S.E.2d 479 (2015) . . . . . .5-4, 5-5; 35-3
Wakole v. Barber, 283 Va. 488, 722 S.E.2d 238 (2012). . . . . .2-44; 9-9
Walker v. Gateway Milling Co., 92 S.E. 826, 121 Va. 217 (1917). . . . . .45-78
Walker v. Mason, 257 Va. 65, 510 S.E.2d 734 (1999).9-7
Walker v. Memorial Hosp., 187 Va. 5, 45 S.E.2d 898 . . . . . .23-30
Walker, 121 Va. 217, 92 S.E. 826 . . . . . 45-78
Walker & Laberge Co. v. First Nat'l Bank, 206 Va. 683, 146 S.E.2d 239. . . . . .45-62
Wallace v. Jones, 168 Va. 38, 190 S.E. 82 (1937) . 5-10
Wallen v. Allen, 231 Va. 289, 343 S.E.2d 73 (1986) . 9-32
Wallen v. Wallen, 107 Va. 131, 57 S.E. 596 (1907) . 48-21; 48-34

[References are to pages]

Wallingford v. Karnes, 194 Va. 648, 74 S.E.2d 161 (1953). . . . . .10-58
Walson v. Walson, 37 Va. App. 208, 556 S.E.2d 53 (2001). . . . . .42-16
Walters v. Norfolk & W. Ry. Co., 122 Va. 149, 94 S.E. 182. . . . . .22-8
Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960). . . . . .9-14
Walton, Witten & Graham v. Miller, 109 Va. 210, 63 S.E. 458. . . . . .4-16
WAMMCO, Inc. v. Commonwealth Transp. Comm'r, 251 Va. 132, 465 S.E.2d 584 (1996). . . . .46-24; 46-38
Ward v. White, 86 Va. 212, 9 S.E. 1021 (1889). . 36-2; 36-15
Wards Co. v. Lewis & Dobrow, Inc., 210 Va. 751, 173 S.E.2d 861 (1970). . . . . .45-32
Ware v. Scott, 220 Va. 317, 257 S.E.2d 855. . . .45-106
Ware v. Ware, 123 S.E.2d 357, 203 Va. 189 (1962). 39-30
Ware, 220 Va. 317, 257 S.E.2d 855. . . . . .39-6
Warren v. Goodrich, 133 Va. 366, 112 S.E. 687 (1922). . . . . .45-90
Wash. & O. D. Ry., 120 Va. 620, 91 S.E. 646. . 45-110
Washabaugh v. Northern Virginia Const. Co., 187 Va. 767, 48 S.E.2d 276, 48 S.E.2d 767 (1948). . . .23-22
Washburn v. Klara, 263 Va. 586, 561 S.E.2d 682 (2002). . . . . .35-28; 35-36; 36-6
Washington v. Williams, 215 Va. 353, 210 S.E.2d 154 (1974). . . . . .9-22
Washington & Old Dominion R.R. Co. v. Ward, 119 Va. 334, 89 S.E. 140. . . . . .1-9
Washington & Old Dominion R.R. v. Taylor, 188 Va. 458, 50 S.E.2d 415. . . . . .19-6; 19-8
Washington & Old Dominion Ry. Co. v. Westinghouse Electric & Mfg. Co., 89 S.E. 131, 120 Va. 620, 91 S.E. 646 (1916). . . . . .45-110; 45-120
Washington & Old Dominion Ry. v. Warner, 124 Va. 452, 97 S.E. 799. . . . . .21-18
Washington Golf & Country Club, Inc. v. Briggs & Brennan Developers, Inc., 95 S.E.2d 233, 198 Va. 586 (1956). . . . . .45-116
Washington Luna Park Co. v. Goodrich, 110 Va. 692, 66 S.E. 977 (1910). . . . . .2-3
Waters v. Commonwealth, 39 Va. App. 72, 569 S.E.2d 763 (2002). . . . . .1-8
Waters v. Safeway Stores, 246 Va. 269, 435 S.E.2d 380 (1993). . . . . .6-4; 6-26
Watford v. Morse, 202 Va. 605, 118 S.E.2d 681 (1961). . . . . .9-20; 10-14
Watson v. Avon St. Bus. Center, Inc., 226 Va. 614, 311 S.E.2d 795. . . . . .9-32; 39-24, 39-25
Watt v. McKelvie, 219 Va. 645, 248 S.E.2d 826 (1978). . . . . .37-12
WBM, LLC v. Wildwoods Holding Corp., 270 Va. 156, 613 S.E.2d 402 (2005). . . . . .45-4
Weatherford v. Birchett, 158 Va. 741, 164 S.E. 535 (1932). . . . . .9-4; 9-33, 9-34; 37-49
Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E.2d 687. . . . . .37-13
Webb v. Rivers, 256 Va. 460, 507 S.E.2d 360 (1998). 9-34; 15-8, 15-9
Webb v. Smith, 176 Va. 235, 10 S.E.2d 503, 131 A.L.R. 558 (1940). . . . . .10-26
Webb v. Smith, 276 Va. 305, 661 S.E.2d 457 (2008). . . . . .35-3; 35-22
Webb v. Virginian-Pilot Media Co., LLC, 287 Va. 84, 752 S.E.2d 808 (2014). . . . . .37-2; 37-13; 37-18
Weddle v. Draper, 204 Va. 319, 130 S.E.2d 462 (1963). . . . . .2-14; 4-12
Weedon v. Weedon, 283 Va. 241, 720 S.E.2d 552 (2012). . . . . .48-6; 48-20; 48-34
Weems v. Blalock, 226 Va. 304, 309 S.E.2d 302 (1983). . . . . .10-14
Weinberg v. Given, 252 Va. 221, 476 S.E.2d 502 (1996). . . . . .2-16
Welch v. McDonald, 8 S.E. 711, 85 Va. 500 (1888). 45-124
Wells v. McMahon, 223 Va. 192, 288 S.E.2d 439 (1982). . . . . .10-14
Wells v. Weston, 229 Va. 72, 326 S.E.2d 672. . .39-40; 45-28
Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616 (1966). . . . . .4-16; 5-4; 8-34
Wendlinger v. Smith, 75 Va. 309 (1881). . . . . .45-26
Wessel, Duval & Co. v. Winborne & Co., 99 S.E. 719, 125 Va. 502 (1919). . . . . .45-118
West v. Anderson, 186 Va. 554, 42 S.E.2d 876 (1947). . . . . .46-4; 46-24; 46-32; 46-36
West v. Critzer, 238 Va. 356, 383 S.E.2d 726 (1989). . . . . .10-8
West v. Porstmouth, 84 S.E.2d 503, 196 Va. 510 (1954). . . . . .32-16; 32-18
West Square, L.L.C. v. Commun. Techs., 274 Va. 425, 649 S.E.2d 698 (2007). . . . . .42-20
Westchester Fire Ins. Co. v. Rose, 159 Va. 633, 166 S.E. 469 (1932). . . . . .47-50
Western State Hosp. v. Wininger, 196 Va. 300, 83 S.E.2d 446. . . . . .48-20, 48-21; 48-38
Westlake Props. v. Westlake Pointe Prop. Owners Ass'n, 273 Va. 107, 639 S.E.2d 257 (2007). . . . . .9-24
Westminster Investing Corp. v. Lamps Unlimited, 237 Va. 543, 379 S.E.2d 316. . . . . .37-14
Westmoreland Coal Co. v. Campbell, 7 Va. App. 217, 372 S.E.2d 411 (1988). . . . . .8-10
Westmoreland-LG&E Partners v. Virginia Elec. & Power Co., 254 Va. 1, 486 S.E.2d 289 (1997). 45-52; 45-78

[References are to pages]

Wheeler v. Barker, 92 Cal. App. 2d 776, 208 P.2d 68 (Cal. Dist. Ct. App. 1949) . . . . . .35-36
White v. Bott, 158 Va. 442, 158 S.E. 880 ((1932)). .39-22
White v. Bott, 158 Va. 442, 163 S.E. 397 (1932) . 39-22
White v. Hunt, 209 Va. 11, 161 S.E.2d 809 (1968) . 10-41; 10-92
White v. John Doe, 207 Va. 276, 148 S.E.2d 797 (1966) . . . . . 2-46
White v. Nationwide Mut. Ins. Co., 245 F Supp. 1 (W.D. Va. 1965). . . . . .47-48
White v. Sands, 197 Va. 617, 90 S.E.2d 835 (1956). 14-8
White v. Sayers, 101 Va. 821, 45 S.E. 747. . . . .45-62
White v. State Farm Mut. Auto. Ins. Co., 208 Va. 394, 157 S.E.2d 925 . . . . . .47-42; 47-76
White Consol. Indus., Inc. v. Swiney, 237 Va. 23, 376 S.E.2d 283 . . . . . .34-36; 34-59
White Sewing Mach. Co. v. Gilmore Furn. Co., 128 Va. 630, 105 S.E. 134. . . . . .45-116
Whitfield v. Dunn, 202 Va. 472, 117 S.E.2d 710 (1961) . . . . . .6-16; 14-8
Whitfield v. Whittaker Mem'l Hosp., 210 Va. 176, 169 S.E.2d 563 (1969) . . . . . .8-6; 35-8; 35-12
Whitley v. Patterson, 204 Va. 36, 129 S.E.2d 19 (1963). . . . . .10-26
Whitmer v. Marcum, 214 Va. 64, 196 S.E.2d 907 (1973) . . . . . 2-54
Whitt v. Godwin, 205 Va. 797, 139 S.E.2d 841 (1965). . . . . .45-94
Wiggs v. Farmer, 205 Va. 149, 135 S.E.2d 829 (1964) . . . . . .41-6; 41-16; 41-22
Wilburn v. Mangano, 299 Va. 348, 851 S.E.2d 474 (2020). . . . . .45-46
Wilby v. Gostel, 265 Va. 437, 578 S.E.2d 796 (2003).4-30
Wiley N. Jackson Co. v. Norfolk, 87 S.E.2d 781, 197 Va. 62 (1955) . . . . . 8-34
Wilkins v. Peninsula Motor Cars, 266 Va. 558, 587 S.E.2d 581. . . . . .39-3
Wilkins v. Sibley, 205 Va. 171, 135 S.E.2d 765 (1964) . . . . . .29-6
Wilkinson v. Allen, 136 Va. 607, 118 S.E. 94 (1923). . . . . .36-14
Willard v. Aetna Cas. & Sur. Co., 213 Va. 481, 193 S.E.2d 776. . . . . .16-2
Williams v. Auto Brokers, 6 Va. App. 570, 370 S.E.2d 321 (1988) . . . . . 2-10
Williams v. Condit, 265 Va. 49, 574 S.E.2d 241 (2003) . . . . . 2-55
Williams v. Cong Le, 276 Va. 161, 662 S.E.2d 73 (2008). . . . . .5-8; 5-10
Williams v. Dominion Tech. Partners, L.L.C., 576 S.E.2d 752, 265 Va. 280 (2003) .40-10; 40-14; 40-16; 40-20
Williams v. Garraghty, 249 Va. 224, 455 S.E.2d 209.37-10
Williams v. Harrison, 255 Va. 272, 497 S.E.2d 467 (1998). . . . . .7-16, 7-17; 7-20
Williams v. Joynes, 278 Va. 57, 677 S.E.2d 261 (2009) . . . . . .5-10
Williams v. Le, 276 Va. 161, 662 S.E.2d 73 . . . . . 5-10
Williams v. Lynchburg Traction & Light Co., 142 Va. 425, 128 S.E. 732 (1925). . . . . .9-46
Williams v. Metro. Life Ins. Co., 139 Va. 341, 123 S.E. 509 (1924) . . . . . .47-60
Williams v. Service, Inc., 99 S.E.2d 648, 199 Va. 326 (1957) . . . . . .7-4
Williams v. Snider, 190 Va. 226, 56 S.E.2d 63 (1949) . . . . . .45-82; 45-130
Williams Paving Co. v. Kreidl, 200 Va. 196, 104 S.E.2d 758 (1958) . . . . . 1-8
Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986) . . . . . .34-56
Willner v. Woodward, 201 Va. 104, 109 S.E.2d 132 (1959). . . . . .35-48
Wilson v. Brown, 136 Va. 634, 118 S.E. 88 (1923) . 1-8
Wilson v. Commonwealth, 25 Va. App. 263, 487 S.E.2d 857 (1997) . . . . . 1-8
Wilson v. Holyfield, 227 Va. 184, 313 S.E.2d 396 (1984). . . . . .45-63
Wilson v. Schmidt & Wilson, Inc., 184 Va. 642, 35 S.E.2d 737 (1945). . . . . .43-4, 43-5
Windsor v. Carlton, 136 Va. 652, 118 S.E. 222 . . 37-58
Winesett, 225 Va. 459, 303 S.E.2d 868 . . . . . 30-14
Wingate v. Coombs, 237 Va. 501, 379 S.E.2d 304 . 45-8
Winn v. Aleda Constr. Co., 227 Va. 304, 315 S.E.2d 193 (1984). . . . . .45-52; 45-62; 45-70
Winn-Dixie Stores, Inc. v. Parker, 240 Va. 180, 396 S.E.2d 649 (1990) . . . . . .23-16
Winslow, Inc. v. Scaife, 219 Va. 997, 254 S.E.2d 58 (1979) . . . . . .42-9
Wintergreen Partners, Inc. v. McGuireWoods, LLP, 280 Va. 374, 698 S.E.2d 913 (2010) . . . . . 42-9
Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943) . . . . . .9-41
Witt v. Merricks, 210 Va. 70, 168 S.E.2d 517 (1969). 7-5; 7-8
WJLA-TV v. Levin, 264 Va. 140, 564 S.E.2d 383 (2002). . . . . .37-10; 37-26; 37-48; 37-52; 37-56
Wohlford v. Quesenberry, 259 Va. 259, 523 S.E.2d 821 (2000). . . . . .24-14; 24-18
Wohlford v. Wohlford, 121 Va. 699, 93 S.E. 629 (1917). . . . . .48-21

[References are to pages]

Wolfe v. Baube, 241 Va. 462, 403 S.E.2d 338 . . . 6-20
Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953) . . . . . 9-41
Wolfe v. Wolfe, 248 Va. 359, 448 S.E.2d 408 (1994) . . . . . .48-24
Wolonter v. United States Casualty Co., 126 Va. 156, 101 S.E. 58 (1919) . . . . . .47-36
Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979) . . . . . .37-3
Womack v. Circle, 70 Va. 192 (1877) . . 1-7; 1-11; 1-13
Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974) . . . . . .4-31; 9-7; 33-10; 33-14
Wood v. Bass Pro Shops, 250 Va. 297, 462 S.E.2d 101 (1995) . . . . . .6-4; 6-27; 34-36; 34-38; 34-58
Wood v. Carwile, 231 Va. 320, 343 S.E.2d 346. .42-22; 45-132
Wood v. Weaver, 92 S.E. 1001, 121 Va. 250 (1917). 27-10; 27-12; 27-14
Wood, 231 Va. 320, 343 S.E.2d 346 . . . . . 45-132
Wood, 250 Va. 297, 462 S.E.2d 101 . . . . .34-36; 34-38
Wood's Ex'r v. Wood, 109 Va. 470, 63 S.E. 994 (1909) . . . . . .48-20
Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990) . . . . . .36-6
Wooddy v. Old Dominion Ins. Co., 72 Va. 362 (1879) . . . . . .47-56
Wooddy v. Taylor, 114 Va. 737, 77 S.E. 498 (1913). 48-21
Wooden v. John Hancock Mut. Life Ins. Co., 205 Va. 750, 139 S.E.2d 801 (1965) . . . . . .47-68
Woodmen of World Life Ins. Soc. v. Grant, 185 Va. 288, 38 S.E.2d 450 (1946) . . . . . 45-86; 47-44
Woods v. Marion, 245 Va. 44, 425 S.E.2d 487, 9 Va. Law Rep. 737 (1993) . . . . . 31-1, 31-2; 32-6
Woods v. Mendez, 265 Va. 68, 574 S.E.2d 263 . . 4-30; 9-32; 9-34; 15-8
Woods v. Town of Marion, 245 Va. 44, 425 S.E.2d 487 . . . . . 31-1; 32-6
Woodward v. Resource Bank, 246 Va. 481, 436 S.E.2d 613 (1993) . . . . . .47-48
Wooldridge v. Echelon Serv. Co., 243 Va. 458, 416 S.E.2d 441 . . . . . .2-28
Worley v. Mathieson Alkali Works, 119 Va. 862, 89 S.E. 880 (1916) . . . . . .26-3; 26-12; 26-14
Worley, 215 Va. 377, 210 S.E.2d 161 . . . . . .30-6
Worrell v. Winstead, 194 Va. 597, 74 S.E.2d 62 (1953) . . . . . .4-12
Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956). .9-32, 9-33; 40-16; 45-4; 45-110
Worrie v. Boze, 198 Va. 891, 96 S.E.2d 799 (1957). .9-32; 45-110
Wray v. Norfolk & W. Ry., 191 Va. 212, 61 S.E.2d 65 (1950) . . . . . .32-10
Wright v. Agelasto, 104 Va. 159, 51 S.E. 191 (1905) . . . . . .45-26
Wright v. Atlantic Coast Line R.R., 110 Va. 670, 66 S.E. 848 . . . . . .7-12
Wright v. Everett, 197 Va. 608, 90 S.E.2d 855 (1956) . . . . . .9-32; 45-4
Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004) . . . . . .35-22
Wright v. Minnicks, 275 Va. 579, 659 S.E.2d 276 (2008) . . . . . .9-40
Wright v. Norfolk & W. Ry., 245 Va. 160, 427 S.E.2d 724 . . . . . 6-16; 18-6
Wright v. Osborne, 175 Va. 442, 9 S.E.2d 452 (1940) . . . . . .10-60
Wright v. Shortridge, 194 Va. 346, 73 S.E.2d 360 (1952) . . . . . .47-16
Wright v. Swain, 168 Va. 315, 191 S.E. 611 (1937). 10-44; 10-56
Wright v. Tate, 208 Va. 291, 156 S.E.2d 562 (1967). 15-12
Wright v. Webb, 234 Va. 527, 362 S.E.2d 919 (1987) . . . . . 23-14; 24-10; 25-6
Wyatt v. McDermott, 283 Va. 685, 725 S.E.2d 555 (2012) . . . . . .38-22; 38-24
Wynne v. Spainhour, 215 Va. 16, 205 S.E.2d 634 (1974) . . . . . .23-14
Wytheville Ins. & Banking Co. v. Teiger, 90 Va. 277, 18 S.E. 195 . . . . . 47-16; 47-29

## Y

Yanago v. Aetna Life Ins. Co., 164 Va. 258, 178 S.E. 904 (1935) . . . . . .47-56
Yates v. Pitman Mfg., Inc., 257 Va. 601, 514 S.E.2d 605 (1999) . . . . . .34-2; 34-8; 34-10
Yates v. Whitten Valley Rental Corp., 226 Va. 436, 309 S.E.2d 330 (1983) . . . . 45-54; 47-26; 47-28; 47-32
Yeagle v. Collegiate Times, 255 Va. 293, 497 S.E.2d 136 . . . . . .37-11; 37-27
Yeary v. Holbrook, 171 Va. 266, 198 S.E. 441 (1938) . . . . . .4-12; 6-4; 6-18
Yeatts v. Minton, 211 Va. 402, 177 S.E.2d 646 (1970) . . . . . .38-10, 38-11
Yellow Cab Co. v. Eden, 178 Va. 325, 16 S.E.2d 625 (1941) . . . . . .10-18
Yerby v. Grigsby, 36 Va. 387 (1838) . . . . . .47-12
Yonker v. Williams, 169 Va. 294, 192 S.E. 753 (1937) . . . . . .4-20
Yorke v. Maynard, 173 Va. 183, 3 S.E.2d 366 (1939) . . . . . .15-12
Young v. Lambert, 253 Va. 237, 482 S.E.2d 823. .6-26; 6-30; 15-14

[References are to pages]

Young-Allen v. Bank of Am., N.A., 298 Va. 462, 839 S.E.2d 897 (2020) . . . . . 45-92
Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 540 S.E.2d 134 (2001) . . . . . 24-10; 25-6

## Z

Zayre of Virginia, Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710. . . . . 37-15; 37-30; 38-6; 38-8
Zedd v. Jenkins, 194 Va. 704, 74 S.E.2d 791 (1953) . 9-32; 9-34
Zelnick v. Adams, 263 Va. 601, 561 S.E.2d 711 (2002). . . . . 42-22
Zircle v. Southern Ry., 102 Va. 17, 45 S.E. 802 . . 46-6
Zirkle v. Commonwealth, 189 Va. 862, 55 S.E.2d 24 (1949) . . . . . 2-10
Zurich General Acci. & Liability Ins. Co. v. Baum, 159 Va. 404, 165 S.E. 518 (1932) . . . . . 45-90; 47-32

# TABLE OF STATUTES

[References are to pages]

## VIRGINIA

### Virginia Code


| Sec. | Page |
|---|---|
| 1-219.1 | 46-6 |
| 2.2-514 | 44-3 |
| 2.2-3605 | 11-7 |
| 2.2-4335(B) | 45-125 |
| 3.2-3900 to 3.2-3947 | 34-56 |
| 3.2-3938 | 34-24; 34-56 |
| 3.2-3938(1) | 34-56 |
| 3.2-3939 | 34-56 |
| 3.2-3939(B) | 34-56 |
| 3.2-5100 to 3.2-5648 | 34-56 |
| 3.2-5120 to 3.2-5128 | 34-32 |
| 3.2-5122 | 34-30 |
| 3.2-5123 | 34-24 |
| 3.2-5123 | 34-30 |
| 3.2-5126 | 34-3; 34-32 |
| 3.2-5144 | 4-22 |
| 3.2-6538 | 29-3 |
| 3.2-6540 | 29-12 |
| 3.2-6540(K)(1) | 29-10 |
| 3.2-6542 | 29-3 |
| 3.2-6553 | 29-3 |
| 4.1-100 | 15-4 |
| 4.1-400 | 40-17 |
| 5-31 | 22-5 |
| 5.1-173 | 4-22 |
| 6.2-107 | 45-90 |
| 6.2-608 to 6.2-610 | 48-11 |
| 8.01-2(5) | 8-6 |
| 8.01-20.1 | 35-3 |
| 8.01-25 | 9-33 |
| 8.01-35 | 9-5; 9-14 |
| 8.01-35.1 | 44-3 |
| 8.01-38 | 35-46 |
| 8.01-38.1 | 9-35; 41-32 |
| 8.01-39 | 8-30 |
| 8.01-42.2 | 25-2 |
| 8.01-44.2 | 4-22 |
| 8.01-44.5 | 4-31; 9-34; 9-38; 9-44; 15-2; 15-8, 9 |
| 8.01-45 | 37-14, 15; 37-30; 37-64; 37-66 |
| 8.01-46 | 37-10; 37-66 |


### Virginia Code—Cont.


| Sec. | Page |
|---|---|
| 8.01-48 | 37-10; 37-64; 37-66 |
| 8.01-49 | 37-64 |
| 8.01-50 | 9-41 |
| 8.01-52 | 9-5; 9-33; 9-40, 41; 9-44; 9-48; 10-22; 10-104; 12-6; 34-42; 46-14; 46-24; 46-30 |
| 8.01-52(5) | 4-31; 9-44 |
| 8.01-52 to 8.01-54 | 9-40 |
| 8.01-53 | 9-41 |
| 8.01-53(A) | 9-40, 41 |
| 8.01-53(C) | 9-41 |
| 8.01-54(B) | 9-42 |
| 8.01-55 | 44-2 |
| 8.01-58 | 6-18 |
| 8.01-59 | 6-27 |
| 8.01-64 | 7-10 |
| 8.01-65 | 7-10 |
| 8.01-66 | 9-24; 9-28; 9-30 |
| 8.01-66.1 | 47-88 |
| 8.01-130 | 27-7; 27-10; 27-12 |
| 8.01-178.1 | 24-22 |
| 8.01-178.2 | 24-3; 24-24 |
| 8.01-178.2 to 8.01-178.4 | 24-2 |
| 8.01-187 | 46-2 |
| 8.01-219.1 | 23-26 |
| 8.01-220 | 33-11 |
| 8.01-220.1:2 | 4-22; 31-6 |
| 8.01-221.1 | 9-6; 37-10; 37-48; 45-112 |
| 8.01-221.2 | 45-100; 45-107 |
| 8.01-223 | 34-2 |
| 8.01-224 | 30-6 |
| 8.01-225 | 4-22; 6-27; 7-2; 7-5; 7-12; 35-5; 35-8; 35-12; 35-36; 35-44 |
| 8.01-225.01 | 4-22; 35-44 |
| 8.01-225.02 | 4-22; 35-44 |
| 8.01-225.03 | 4-22; 35-44 |
| 8.01-225.1 | 4-22; 35-8; 35-12; 35-44 |
| 8.01-225.2 | 4-22 |
| 8.01-225.3 | 11-3; 11-7 |
| 8.01-226 | 23-36 |
| 8.01-226.2 | 4-22 |
| 8.01-226.3 | 4-22 |
| 8.01-226.4 | 4-22 |
| 8.01-226.5 | 4-22 |

[References are to pages]

**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 8.01-226.5:1 | .4-22 |
| 8.01-226.5:2 | .4-24 |
| 8.01-226.7 | .4-24 |
| 8.01-226.8 | .4-24 |
| 8.01-226.9 | .33-10; 36-2; 36-7; 37-12; 37-36; 38-2; 38-8; 38-18; 38-20; 41-2; 41-18; 41-26; 41-28 |
| 8.01-226.10 | .41-3 |
| 8.01-226.12(E) | .24-6 |
| 8.01-227.19 | .6-27; 6-30 |
| 8.01-227.22 | .4-6 |
| 8.01-229(G) | .45-38 |
| 8.01-230 | .42-10 |
| 8.01-232 | .45-86 |
| 8.01-243 | .26-3; 26-12; 26-14; 26-18 |
| 8.01-246 | .42-9 |
| 8.01-246(3) | .8-34 |
| 8.01-247.1 | .37-13, 14 |
| 8.01-248 | .40-22 |
| 8.01-272 | .9-34; 27-3 |
| 8.01-279(B) | .8-2 |
| 8.01-279(C) | .8-40 |
| 8.01-376 | .2-26 |
| 8.01-379.1 | .2-44; 9-9 |
| 8.01-379.2 | .1-2; 1-8 |
| 8.01-379.2:1 | .2-3 |
| 8.01-379.2:1(a) | .2-3 |
| 8.01-379.2:1(b) | .2-3 |
| 8.01-397 | .2-54 |
| 8.01-399 | .35-3 |
| 8.01-401.1 | .2-16 |
| 8.01-401.2:1 | .35-22 |
| 8.01-403 | .2-30; 2-34 |
| 8.01-404 | .2-30, 31; 2-34, 35 |
| 8.01-413.01 | .9-5 |
| 8.01-418 | .36-7 |
| 8.01-419 | .9-48 |
| 8.01-419.1 | .9-24 |
| 8.01-425 | .44-2 |
| 8.01-443 | .44-2 |
| 8.01-581.1 | .9-22; 35-2; 35-8; 35-12 |
| 8.01-581.2 | .35-26 |
| 8.01-581.2 to 8.01-581.6 | .35-2 |
| 8.01-581.2(A) | .35-2 |
| 8.01-581.3 | .35-26 |
| 8.01-581.7 | .35-2 |
| 8.01-581.7(A) | .35-26 |


**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 8.01-581.8 | .35-2; 35-26 |
| 8.01-581.13 | .35-2 |
| 8.01-581.15 | .9-9; 35-2 |
| 8.01-581.20 | .35-2; 35-8, 9; 35-12; 35-22; 35-46 |
| 8.01-581.20(A) | .35-3 |
| 8.01-581.20(C) | .35-3 |
| 8.2-101 | .45-4 |
| 8.2-103(1)(d) | .34-6 |
| 8.2-106 | .45-12 |
| 8.2-201 | .45-46; 45-90 |
| 8.2-201 to 8.2-207 | .45-12 |
| 8.2-202 | .45-74 |
| 8.2-205 | .45-14 |
| 8.2-205 to 8.2-207 | .45-34 |
| 8.2-206 | .45-14; 45-16; 45-20; 45-22; 45-24; 45-26 |
| 8.2-207 | .45-16; 45-20; 45-22; 45-24; 45-26 |
| 8.2-209 | .45-86; 45-90; 45-92 |
| 8.2-209(3) | .45-90 |
| 8.2-313 | .34-10 |
| 8.2-313(1)(a) | .34-10 |
| 8.2-313(1)(b) to (c) | .34-14 |
| 8.2-313(2) | .34-10; 34-14 |
| 8.2-314 | .34-32 |
| 8.2-314(1) | .34-20; 34-24 |
| 8.2-314(2) | .34-24 |
| 8.1A-204 | .45-18 |
| 8.1A-303 | .45-74; 45-78 |
| 8.2-314(2)(a) | .34-24 |
| 8.2-314(2)(c) | .34-20; 34-24 |
| 8.2-314(e) | .34-24 |
| 8.2-314(f) | .34-24 |
| 8.2-315 | .34-16; 34-18 |
| 8.2-316 | .34-16; 34-18; 34-20; 34-40; 34-42; 45-56 |
| 8.2-316(3)(b) | .34-40 |
| 8.2-317.1 | .34-14 |
| 8.2-318 | .34-2 |
| 8.2-607 | .34-8 |
| 8.2-607(3) | .34-8 |
| 8.2-607(3)(a) | .34-8 |
| 8.2-615 | .45-96 |
| 8.2-703 | .45-82 |
| 8.2-708 to 8.2-718 | .45-110 |
| 8.2-711 | .45-82 |
| 8.2-715 | .34-64; 45-120 |
| 8.2-715(2)(a) | .45-120 |

[References are to pages]

**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 8.2-718 | 45-124 |
| 8.7-102(1) | 28-20; 28-22 |
| 8.7-209 | 28-20; 28-22 |
| 8.7-210 | 28-20; 28-22 |
| 8.7-403(1) | 28-20; 28-22 |
| 8.3A-103(4) | 44-8 |
| 8.3A-104 | 44-8 |
| 8.3A-104(b) | 44-8 |
| 8.3A-311 | 44-2; 44-8; 44-10 |
| 9.1-154 | 4-24 |
| 11-2.1 | 45-113 |
| 11-2.2 | 45-113 |
| 11-12 | 44-2; 44-10 |
| 13.1-629 | 45-5 |
| 13.1-900 | 45-4 |
| 15.2-209 | 32-2 |
| 15.2-209(A) | 32-2 |
| 15.2-209(G) | 32-2 |
| 15.2-970 | 31-2 |
| 15.2-1405 | 4-24 |
| 15.2-1809 | 4-24; 31-3 |
| 15.2-1809.1 | 4-24 |
| 15.2-1901 to 15.2-1907.1 | 46-6 |
| 15.2-2001 | 32-2; 32-6; 32-10 |
| 16.1-253 | 38-12 |
| 16.1-253.2 | 38-12, 13 |
| 18.2-57(G) | 36-3; 36-7; 36-10; 36-15 |
| 18.2-57.2 | 38-12 |
| 18.2-60.4 | 38-12, 13 |
| 18.2-61 | 33-11 |
| 18.2-67.1 | 33-11 |
| 18.2-67.3 | 33-11 |
| 18.2-67.4 | 33-11 |
| 18.2-105 | 41-18; 41-26; 41-28 |
| 18.2-105.1 | 38-2; 38-8; 38-18; 38-20 |
| 18.2-106 | 38-18 |
| 18.2-119 | 23-4 |
| 18.2-120 | 23-4 |
| 18.2-121 | 23-4 |
| 18.2-125 | 23-4 |
| 18.2-128 | 23-4 |
| 18.2-131 | 23-4 |
| 18.2-132 | 23-4 |
| 18.2-132.1 | 23-4 |
| 18.2-134 | 23-4 |
| 18.2-183 | 41-3 |


**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 18.2-185 | 41-3 |
| 18.2-187.2(B) | 38-8; 38-18 |
| 18.2-200.1 | 39-3 |
| 18.2-214 | 40-3 |
| 18.2-216 | 39-7; 39-28; 40-3; 40-22; 40-24 |
| 18.2-266 | 15-4 |
| 18.2-268.2 | 15-9 |
| 18.2-415 | 22-14 |
| 18.2-417 | 37-30 |
| 18.2-499 | 40-2; 40-11; 40-16, 17; 40-20 |
| 18.2-499(A)(ii) | 40-17; 40-20 |
| 18.2-500 | 40-2, 3; 40-11; 40-16, 17; 40-20 |
| 19.2-71 to 19.2-75 | 38-10 |
| 19.2-76 | 38-10 |
| 19.2-80 | 38-16 |
| 19.2-81 | 38-10; 38-12 |
| 19.2-81.1 | 38-13 |
| 19.2-81.3 | 38-12 |
| 19.2-82 | 38-16 |
| 19.2-83.3 | 36-3; 36-7; 36-18 |
| 19.2-100 | 38-10, 11; 38-16 |
| 19.2-263.2 | 1-2 |
| 19.2-269 | 2-38, 39 |
| 22.1-190 | 12-2 |
| 22.1-190(A) | 12-2 |
| 22.1-190(D) | 12-2 |
| 22.1-194 | 12-2; 31-4 |
| 22.1-258 | 4-24 |
| 22.1-266 | 4-24 |
| 22.1-274.2 | 4-24 |
| 22.1-279.1 | 36-2; 36-7; 36-10; 36-15 |
| 22.1-296.3 | 4-24 |
| 25.1-100 | 46-3; 46-11; 46-14; 46-16; 46-28 |
| 25.1-204 | 44-14 |
| 25.1-206 | 46-2 |
| 25.1-220 | 46-2 |
| 25.1-227.1 | 46-2 |
| 25.1-227.2 | 46-2 |
| 25.1-228 | 46-2 |
| 25.1-229 | 46-2; 46-42 |
| 25.1-230 | 46-2; 46-8; 46-10; 46-14; 46-24; 46-32; 46-50 |
| 25.1-230(A)(2) | 46-3 |
| 25.1-230.1 | 46-3; 46-11; 46-28; 46-34 |
| 25.1-230.1(B) | 46-28 |
| 25.1-230.1(C) | 46-30 |
| 25.1-231 | 46-25; 46-36 |

[References are to pages]

**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 25.1-232 | 46-42; 46-50 |
| 25.1-234(C) | 46-8 |
| 25.1-300 | 46-3 |
| 25.1-406 | 46-25 |
| 25.1-417 | 44-14 |
| 25.1-417(A)(2) | 44-14 |
| 29.1-205 | 38-13 |
| 29.1-509 | 4-24; 23-20; 31-3 |
| 32.1-27.1 | 4-24 |
| 32.1-36.1 | 4-24 |
| 32.1-116.2 | 4-24 |
| 32.1-122.10:005 | 4-24 |
| 32.1-126.01 | 4-24 |
| 32.1-126.02 | 4-24 |
| 32.1-127.3 | 4-24 |
| 32.1-162.9:1 | 4-24 |
| 32.1-163.1 | 4-24 |
| 32.1-283.2 | 4-25 |
| 32.1-283.3 | 4-25 |
| 33.2-400 | 46-44 |
| 33.2-401 | 46-44 |
| 33.2-1018 | 46-16 |
| 33.2-1018 to 33.2-1029 | 46-3 |
| 33.2-1018 to 33.2-1029 | 46-8; 46-10 |
| 33.2-1018 to 33.2-1029 | 46-14 |
| 33.2-1028 | 46-32 |
| 35.1-28 | 25-2 |
| 35.1-28(A) | 25-6 |
| 36-27 | 46-16 |
| 36-98.3 | 22-5 |
| 37.1-179 | 4-25 |
| 37.2-416 | 4-25 |
| 37.2-506 | 4-25 |
| 37.2-717 | 44-3 |
| 37.2-900 | 49-3; 49-6; 49-12; 49-14; 49-16 |
| 37.2-900 to 37.2-921 | 49-2 |
| 37.2-903(A) | 49-2 |
| 37.2-903(B) | 49-2 |
| 37.2-904 | 49-2 |
| 37.2-904(B) | 49-3; 49-16 |
| 37.2-905 | 49-2 |
| 37.2-905(A) | 49-2 |
| 37.2-906(A) | 49-2, 3 |
| 37.2-906(C) | 49-3 |
| 37.2-907(A) | 49-3; 49-16 |
| 37.2-908(A) | 49-3 |


**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 37.2-908(B) | 49-3 |
| 37.2-908(C) | 49-3; 49-6; 49-8; 49-16 |
| 37.2-908(D) | 49-3 |
| 37.2-908(G) | 49-3 |
| 37.2-909(A) | 49-3 |
| 37.2-910(A) | 49-4 |
| 38.2-100 | 47-8 |
| 38.2-109 | 47-4 |
| 38.2-209(A) | 47-52; 47-74 |
| 38.2-302 | 47-29 |
| 38.2-302(A)(1) to (2) | 47-30 |
| 38.2-304 | 47-32 |
| 38.2-304(B) | 47-32 |
| 38.2-305 | 45-54; 47-28, 29 |
| 38.2-309 | 47-60; 47-78 |
| 38.2-314 | 47-52 |
| 38.2-320 | 47-52 |
| 38.2-1800 | 47-3; 47-8; 47-10 |
| 38.2-1801 | 47-10 |
| 38.2-1801(A) | 47-8 |
| 38.2-2105 | 47-28; 47-52; 47-56 |
| 38.2-2112 | 47-32 |
| 38.2-2114 | 47-36 |
| 38.2-2204 | 16-3; 47-57; 47-70; 47-84 |
| 38.2-2204(A) | 47-84, 85 |
| 38.2-2204(D) | 47-57 |
| 38.2-2206 | 16-6; 16-8 |
| 38.2-2206(B) | 16-6; 47-85 |
| 38.2-2206(E) | 16-2 |
| 38.2-2206(K) | 47-88 |
| 38.2-2226 | 47-52; 47-57 |
| 38.2-3106 | 47-92 |
| 38.2-3503 | 47-56 |
| 38.2-3504 | 47-36 |
| 38.2-3514 | 47-78 |
| 38.2-5000 | 9-9 |
| 42.1-73.1 | 38-18 |
| 44-146.23 | 4-25 |
| 44-146.28:1 | 4-25 |
| 44-146.36 | 4-25 |
| 45.1-161.76 | 4-25 |
| 45.1-161.292:49 | 4-25 |
| 46.2-100 | 10-24; 10-32; 10-92; 10-98; 11-2; 12-2, 3; 12-12; 14-2; 14-4; 14-18; 17-2 |
| 46.2-111(A) | 10-114 |
| 46.2-111(B) | 10-114 |

[References are to pages]

**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 46.2-341.4 | 10-113 |
| 46.2-342 | 4-25 |
| 46.2-349 | 7-10 |
| 46.2-473 | 47-70 |
| 46.2-750.1 | 17-22 |
| 46.2-801 | 11-2 |
| 46.2-802 | 10-44; 10-48; 10-52 |
| 46.2-803 | 10-44 |
| 46.2-804 | 10-50; 10-54 |
| 46.2-804(1) | 10-50 |
| 46.2-804(2) | 10-58 |
| 46.2-804(3) | 10-56 |
| 46.2-804(5) | 10-54; 10-56 |
| 46.2-804(5) to (6) | 10-54 |
| 46.2-807 | 10-44 |
| 46.2-812 | 10-28 |
| 46.2-816 | 10-12 |
| 46.2-820 | 10-92 |
| 46.2-820 to 46.2-829 | 10-96 |
| 46.2-821 | 10-86; 10-88 |
| 46.2-822 | 10-102 |
| 46.2-823 | 10-86; 10-88; 10-92; 10-96; 10-98; 10-102 |
| 46.2-824 | 10-72; 10-92 |
| 46.2-825 | 10-72 |
| 46.2-826 | 10-98 |
| 46.2-829 | 11-16 |
| 46.2-833 | 14-12 |
| 46.2-833(A) | 10-78; 10-80; 10-82; 10-86; 10-88 |
| 46.2-833(B) | 10-78 |
| 46.2-833(C) | 10-78; 10-80; 10-82 |
| 46.2-835 | 10-84 |
| 46.2-837 | 10-44; 10-52 |
| 46.2-838 | 10-44; 10-62 |
| 46.2-838(A) | 10-62 |
| 46.2-839 | 10-62 |
| 46.2-841 | 10-44 |
| 46.2-843 | 10-44 |
| 46.2-843 | 10-44; 10-60 |
| 46.2-846(A)(1) | 10-70 |
| 46.2-846(A)(2) | 10-74 |
| 46.2-846(A)(3) | 10-76 |
| 46.2-848 | 10-64; 10-66 |
| 46.2-849 | 10-66 |
| 46.2-849(A) | 10-66 |
| 46.2-849(B) | 10-66 |
| 46.2-849(B) | 10-66 |


**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 46.2-849(C) to (D) | 10-66 |
| 46.2-850 | 10-68 |
| 46.2-851 | 10-64 |
| 46.2-853 | 10-8; 10-32 |
| 46.2-855 | 10-22 |
| 46.2-858 | 10-44 |
| 46.2-859 | 12-3; 12-12; 12-18 |
| 46.2-861 | 10-8 |
| 46.2-861.1 | 11-18 |
| 46.2-870 | 10-34 |
| 46.2-871 | 10-34; 12-2 |
| 46.2-872 | 10-34 |
| 46.2-873 | 10-34 |
| 46.2-873.1 | 10-34 |
| 46.2-873.2 | 10-34 |
| 46.2-874 | 10-34 |
| 46.2-874.1 | 10-34 |
| 46.2-875 | 10-34 |
| 46.2-876 | 10-34 |
| 46.2-877 | 10-8; 10-36; 10-38; 10-108 |
| 46.2-878.1 | 10-34 |
| 46.2-878.2 | 10-34 |
| 46.2-880 | 10-39; 10-41 |
| 46.2-885(A) | 18-2; 18-16; 18-20 |
| 46.2-885(B) | 18-2; 18-20 |
| 46.2-886 | 18-2; 18-18 |
| 46.2-888 | 10-104; 10-110; 10-112; 12-10 |
| 46.2-888(B) | 10-105 |
| 46.2-888(C) | 10-105 |
| 46.2-891 | 10-104 |
| 46.2-892 | 10-104 |
| 46.2-893 | 10-104; 12-2; 12-10 |
| 46.2-904 | 14-4 |
| 46.2-912 | 17-10 |
| 46.2-919.1 | 12-2 |
| 46.2-920 | 11-2; 11-10; 11-12; 11-14; 11-16 |
| 46.2-920(B) | 11-2 |
| 46.2-920(C) | 11-2; 11-16 |
| 46.2-920.1 | 11-4 |
| 46.2-920.2 | 11-4 |
| 46.2-923 | 14-4; 14-16 |
| 46.2-924 | 10-80; 14-4; 14-12 |
| 46.2-924(B) | 14-12 |
| 46.2-924(C) | 14-12, 13 |
| 46.2-925 | 14-12; 14-18 |
| 46.2-926 | 10-110; 14-10 |

[References are to pages]

**Virginia Code**—Cont.


| Sec. | Page |
|---|---|
| 46.2-928 | 14-8 |
| 46.2-1003 | 17-8 |
| 46.2-1011 | 17-4 |
| 46.2-1012 | 17-6; 17-8 |
| 46.2-1013 | 17-6 |
| 46.2-1014 | 17-8 |
| 46.2-1014.1 | 17-8 |
| 46.2-1015 | 10-24 |
| 46.2-1022 | 11-15, 16 |
| 46.2-1023 | 11-15, 16 |
| 46.2-1024 | 11-15, 16 |
| 46.2-1030 | 10-24 |
| 46.2-1030(A) | 10-24 |
| 46.2-1030(A)(ii) | 10-24 |
| 46.2-1030(A)(iii) | 10-24 |
| 46.2-1031 | 17-4 |
| 46.2-1032 | 17-4 |
| 46.2-1052 | 10-22 |
| 46.2-1054 | 10-22 |
| 46.2-1055 | 17-16 |
| 46.2-1059 | 17-10 |
| 46.2-1066 | 4-3; 10-32; 17-12 |
| 46.2-1067 | 4-3 |
| 46.2-1067 | 10-32 |
| 46.2-1067 | 17-11, 12 |
| 46.2-1068 | 4-3 |
| 46.2-1081 | 10-38 |
| 46.2-1082 | 17-14 |
| 46.2-1088.3 | 17-22 |
| 46.2-1088.3(B) to (C) | 17-22 |
| 46.2-1088.3(F) | 5-10 |
| 46.2-1089 | 12-2 |
| 46.2-1090 | 12-2, 3; 12-6; 12-12 |
| 46.2-1105 | 17-20 |
| 46.2-1111 | 17-20 |
| 46.2-1121 | 17-18 |
| 46.2-2011.18 | 22-12; 22-14 |
| 46.2-2099.42 | 4-25 |
| 50-73.79 | 8-40 |
| 50-73.95 | 8-40 |
| 50-73.96 | 8-40 |
| 50-73.96(A) | 8-40 |
| 50-73.96(B) | 8-40 |
| 54.1-106 | 4-25 |
| 54.1-2100 | 43-6 |
| 54.1-2101 | 43-6 |
| 54.1-2103 | 43-6 |
| 54.1-2106.1 | 43-6 |
| 54.1-2130 | 43-22 |
| 54.1-2131 | 43-22 |
| 54.1-2132 | 43-22 |
| 54.1-2139 | 43-24 |
| 54.1-2144 | 43-22; 43-24 |
| 54.1-2524 | 4-26 |
| 54.1-2970 | 35-36; 35-46 |
| 54.1-3400 to 54.1-3472 | 34-56 |
| 54.1-3462 | 34-24 |
| 54.1-3465 | 34-24 |
| 54.1-3811 | 4-26 |
| 54.1-3906 | 42-8 |
| 54.1-3932 | 42-22 |
| 55.1-119 | 45-10 |
| 55.1-357 | 35-50 |
| 55.1-1200 to 55.1-1259 | 24-2 |
| 55.1-1201 | 24-2 |
| 55.1-1220 | 24-2; 24-6; 24-10; 24-14; 24-20 |
| 55.1-1220(A)(1) | 24-2; 24-6 |
| 55.1-1220(A)(2) | 24-2; 24-14 |
| 55.1-1220(A)(3) | 24-2; 24-10 |
| 55.1-1227 | 24-22; 24-24 |
| 55.1-1227(A)(1) | 24-2; 24-6 |
| 55.1-1227(A)(2) | 24-2 |
| 55.1-1227(A)(7) | 24-3 |
| 55.1-1227(A)(13) | 24-6 |
| 55.1-1228 | 24-22; 24-24 |
| 55.1-1234 | 24-6 |
| 55.1-1239 | 24-6 |
| 55.1-1239(A) | 24-6 |
| 55.1-1239(B) | 24-6 |
| 55.1-1248 | 24-3; 24-22 |
| 55.1-1259 | 24-10 |
| 55.1-1300 to 55.1-1319 | 24-2 |
| 55.1-1400 to 55.1-1428 | 24-2 |
| 55.1-2809 | 29-2 |
| 55.1-2810 | 29-2; 29-6 |
| 55.1-2810 to 55.1-2841 | 27-3 |
| 55.1-2814 | 29-2 |
| 55.1-2820 | 29-2 |
| 55.1-2834 | 29-2 |
| 55.1-2835 | 9-24; 27-3; 27-6; 27-10; 27-12; 27-14 |
| 55.1-2835 to 55.1-2836 | 27-14 |
| 55.1-2835 to 55.1-2841 | 27-3 |

[References are to pages]

## Virginia Code—Cont.


| Sec. | Page |
|---|---|
| 55.1-2836 | 27-3; 27-14 |
| 56-354 | 22-12; 22-14 |
| 56-405 | 18-52 |
| 56-405.1 | 18-42 |
| 56-405.2 | 18-40 |
| 56-406.1 | 18-42 |
| 56-411 | 18-46; 18-48; 18-50 |
| 56-414 | 18-16; 18-22; 18-24; 18-26; 18-30 |
| 56-416 | 18-3 |
| 56-416 | 18-10 |
| 56-416 | 18-26, 27; 18-30 |
| 56-428 | 20-2; 20-8 |
| 56-484.18 | 4-26 |
| 59.1-21.1 | 40-3; 40-22 |
| 59.1-21.7:1 | 40-22 |
| 59.1-68.3 | 39-7; 39-28; 40-3; 40-22 |
| 59.1-68.3 | 40-22 |
| 59.1-68.3 | 40-22; 40-24 |
| 59.1-196 to 59.1-207 | 34-10; 39-3 |
| 59.1-204(A) | 39-3 |
| 59.1-207.9 | 34-4; 45-4 |
| 59.1-207.10 | 34-4 |
| 59.1-207.10 | 34-4 |
| 59.1-207.11 | 34-4 |
| 59.1-207.11 | 34-64; 34-66; 34-68 |
| 59.1-207.12 | 34-64 |
| 59.1-207.13(A) | 34-64 |
| 59.1-207.13(B) | 34-66 |
| 59.1-207.13(F) | 34-4 |
| 59.1-207.14 | 34-4 |
| 59.1-207.16 | 34-4 |
| 59.1-207.13E | 34-4 |
| 62.1-44.34:18 | 4-26 |
| 63.2-1720 | 4-26 |
| 63.2-1902 | 4-26 |
| 63.2-1932 | 4-26 |
| 64.2-100 | 48-10 |
| 64.2-108.1 | 48-10 |
| 64.2-401 | 48-20 |
| 64.2-403 | 48-2; 48-10, 11; 48-14, 15; 48-25; 48-38 |
| 64.2-403(A) | 48-14 |
| 64.2-403(B) | 48-15 |
| 64.2-404 | 48-2; 48-10, 11; 48-15; 48-25; 48-38 |


## Virginia Code—Cont.


| Sec. | Page |
|---|---|
| 64.2-404(A) | 48-6 |
| 64.2-404(B) | 48-6 |
| 64.2-404.1(A) | 48-6; 48-11 |
| 64.2-404.1(B) | 48-6; 48-11 |
| 64.2-404.1(D) | 48-7; 48-11 |
| 64.2-407 | 48-10 |
| 64.2-408 | 48-10 |
| 64.2-410 | 48-3; 48-24 |
| 64.2-410(C) | 48-24 |
| 64.2-411 | 48-3; 48-24, 25; 48-32 |
| 64.2-412 | 48-3; 48-24 |
| 64.2-413 | 48-24 |
| 64.2-444 | 48-2 |
| 64.2-445 | 48-2 |
| 64.2-446 | 48-2 |
| 64.2-448 | 48-2 |
| 64.2-520.1(A) | 42-10 |
| 64.2-520.1(B) | 42-10 |
| 64.2-520.1(C) | 42-10 |
| 64.2-2500 | 47-92 |
| 65.2-101 | 8-16 |
| 65.2-301 | 33-11 |
| 65.2-714 | 42-20 |
| 65.2-804(B) | 47-36 |
| Va. Code Ann. 3 8.2-2212 | 47-36 |
| Va. Code Ann. 8.1A-103(b) | 45-4 |
| Va. Code Ann. 38.2-2208 | 47-36 |
| Va. Code Ann. 46.2-885(A) | 18-16 |
| Va. Code Ann. 59.1.207.11 | 34-64 |


## Virginia Supreme Court Rules


| Rule | Page |
|---|---|
| 1:10 | 8-2; 8-40 |
| 2:408 | 44-2; 44-14 |
| 3:13 | 45-10 |
| 3:18(c) | 6-16 |
| 3A:16(a) | 1-10 |
| 4:7(C) | 2-14 |
| 5:25 | 1-10 |
| 5A:18 | 1-10 |
| 706 | 18-36; 18-40 |
| 1977 | 37-3 |

[References are to pages]

## FEDERAL STATUTES, RULES, AND REGULATIONS

### United States Constitution


| Amend. | Page |
|---|---|
| amend.:1 | 33-11; 37-10 |
| amend.:5 | 46-6 |


### United States Code


| Title:Sec. | Page |
|---|---|
| 26:501(c)(3) | 35-46 |
| 28:1445(a) | 21-2 |
| 42:1983 | 38-6 |
| 42:2000 | 25-4 |
| 42:2000(a) | 25-4 |
| 45:1 to 22 | 21-2 |
| 45:23 to 43 | 21-2 |
| 45:51 | 6-18; 21-2; 21-6; 21-10 |
| 45:51 to 54a | 21-22 |
| 45:53 | 21-3; 21-16; 21-18; 21-20 |
| 45:53 to 55 | 21-2 |
| 45:54 | 21-3; 21-18 |
| 45:54a | 21-3; 21-16 |


### United States Code—Cont.


| Title:Sec. | Page |
|---|---|
| 45:56 | 21-2; 21-6 |
| 49:20101 | 18-2; 21-2; 21-18; 21-20 |
| 49:20106(a)(1) to (2) | 18-3 |
| 49:20106(a)(2) | 18-3; 18-22 |
| 49:20106(b) to (c) | 18-3 |
| 49:20301 | 21-2 |
| 49:20701 | 21-3 |
| 49 U.S.C. 20101 | 21-6; 21-20 |


### Code of Federal Regulations


| Title:Sec. | Page |
|---|---|
| 49:213.9 | 18-36 |
| 49:213.37 | 18-3; 18-46; 18-48; 18-50 |
| 49:222.21 | 18-24 |
| 49:222.21(a) | 18-22; 18-26 |
| 49:222.25 | 18-30 |
| 49:234.245 | 18-40 |
| 49:390.1 | 10-3 |
| 49:392.14 | 10-3 |

# INDEX

[References are to Instruction Numbers.]

## A


**ACCEPTANCE**
Contracts . . . 45.030; 45.070; 45.080

**ACCIDENT AND SICKNESS INSURANCE**
Generally . . . 47.500-47.550

**ACCIDENTS**
Insurance, accidental death . . . 47.820
Motor vehicles stopping on highway . . . 10.350

**ACCORD AND SATISFACTION**
Compromise and settlement . . . 44.010; 44.015

**ADEQUACY OF CONSIDERATION**
Contracts . . . 45.120

**ADMISSION OF LIABILITY**
General instruction . . . 2.200

**ADVERSE INTERESTS**
Brokers . . . 43.070

**ADVERSE WITNESS**
General instructions . . . 2.030

**ADVERTISEMENTS**
False advertising
- Finding instruction . . . 40.450
- Issues . . . 40.400

Products liability, express warranty by advertisement . . . 34.030

**ADVICE OF COUNSEL**
Malicious prosecution . . . 41.080

**AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS**
Assistant of employee, employer's liability for acts of . . . 8.070
Borrowed employee, special employer liability for acts of . . . 8.080
Burden of proof . . . 8.020
Business joint venture, definition of . . . 8.120
Definitions
- Business joint venture . . . 8.120
- Employer and employee . . . 8.000
- Independent contractor . . . 8.100
- Non-business joint venture . . . 8.130
- Partnership . . . 8.150

Independent contractors . . . 8.100; 8.110
Insurance and insurance agents . . . 47.000-47.070
Intentional acts, scope of employment . . . 8.060
Joint enterprise or joint venture . . . 8.120-8.140
Multiple motives, scope of employment . . . 8.050
Negligence of employee, employer's liability for . . . 8.010
Non-business joint venture, definition of . . . 8.130
Partnerships . . . 8.150
Presumption of scope of employment . . . 8.030
Principal's liability for acts of independent contractor . . . 8.110

**AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS**—Cont.
Railroads, duty to employee of consignee . . . 20.000
Scope of employment
- Generally . . . 8.040
- Intentional acts . . . 8.060
- Multiple motives . . . 8.050
- Presumption of . . . 8.030

**AGGRAVATION OF INJURIES**
Generally . . . 9.030; 9.040

**AGGRESSOR**
Accident and sickness insured as . . . 47.510

**AIRBAGS**
Motor vehicles . . . 17.090

**"ALLEN CHARGE"**
General instruction . . . 2.250

**ALLERGIC USERS**
Products liability . . . 34.080

**AMBER LIGHT**
Motor vehicles . . . 10.266

**AMOUNT OR QUANTITY**
General instruction that amount sued for is not evidence . . . 2.180

**ANIMALS**
Contributory negligence, wild animals . . . 29.040
Dog owners, duties of . . . 29.020
Farm animals, owner's duty . . . 29.000
No leash ordinance . . . 29.020
Notice or knowledge of propensities of breed . . . 29.010
Wild animals . . . 29.030; 29.040

**ANSWERS**
Insurance, answers recorded by agent . . . 47.220

**ANTICIPATED TRESPASSERS**
Railroads . . . 19.020

**APOLOGY**
Defamation, mitigation of damages . . . 37.130

**APPARENT AUTHORITY**
Attorney and client . . . 42.030
Insurance agents . . . 47.040

**APPLICATIONS**
Untrue statements in insurance applications . . . 47.210

**APPOINTED AGENT**
Insurance . . . 47.000

**APPROACHING DRIVERS**
School buses, duties of approaching drivers . . . 12.040-12.070

**ARCHITECTS**
Professional liability . . . 35.200

[References are to Instruction Numbers.]

**ARREST**
Assault during . . . 36.030; 36.040

**ASSAULT AND BATTERY**
Affirmative defenses
Finding instruction . . . 36.081
General instruction . . . 36.080
No affirmative defenses . . . 36.070; 36.071
Arrest, assault during . . . 36.030; 36.040
Burden of proof . . . 36.050; 36.060
Common carriers' duty to protect passengers from assault . . . 22.020; 22.030
Compensatory damages . . . 36.090
Defenses . . . 36.050-36.080
Definitions . . . 36.000; 36.010
Finding instructions
Assault . . . 36.071; 36.081
Battery . . . 36.070; 36.080
Resisting arrest . . . 36.040
Self-defense . . . 36.020
Sexually violent predators, civil commitment of (See SEXUALLY VIOLENT PREDATORS, CIVIL COMMITMENT OF)

**ASSISTANT OF EMPLOYEE**
Employer's liability for acts of . . . 8.070

**ASSUMPTION OF RISK**
Burden of proof . . . 6.110
Definition of . . . 6.100
Intoxicated drivers, riding with . . . 15.020

**ATTORNEY AND CLIENT**
Apparent authority . . . 42.030
Authority, scope of . . . 42.020
Creation of relationship . . . 42.000
Dealings between attorney and client . . . 42.050
Discharge of attorney . . . 42.060
Malicious prosecution, advice of counsel . . . 41.080
Quantum meruit, wrongfully discharged attorney . . . 42.060
Ratification by client . . . 42.040
Standard of care of attorney . . . 42.010
Third parties . . . 42.030
Wrongful discharge of attorney . . . 42.060

**AUTHORITY**
Attorney, scope of authority . . . 42.020

**AUTHORITY TO EJECT DISORDERLY PERSONS**
Common carriers . . . 22.040

**AUTOMOBILES**
Motor vehicles (See MOTOR VEHICLES)

## B

**BAILMENTS**
Bailee, definition of . . . 28.000
Bailor, definition of . . . 28.000
Burden of proof . . . 28.070; 28.071
Contract, generally . . . 28.070; 28.080
Definition . . . 28.000
Finding instructions . . . 28.080; 28.081
Gratuitous bailment . . . 28.030

**BAILMENTS**—Cont.
Mutual benefit bailments . . . 28.010; 28.040
Negligence of bailee not imputed to bailor . . . 28.060
Tort, generally . . . 28.071; 28.081

**BARRIERS**
Railroad crossings . . . 18.070

**BELLS**
Railroad crossings . . . 18.080

**BIAS**
General instruction that verdict not to be based on . . . 2.220

**BLASTING DAMAGE FROM EXPLOSIVES**
Strict liability . . . 30.010

**BORROWED EMPLOYEE**
Special employer liability for acts of . . . 8.080

**BRAKE LIGHTS**
Motor vehicles . . . 17.020

**BRAKES AND BRAKE REQUIREMENTS**
Motor vehicles . . . 10.070; 17.040

**BRIDGES**
Municipal corporations, liability of (See MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES)

**BROKERS**
Adverse interests . . . 43.070
Definition of ready, willing, and able . . . 43.050
General agency . . . 43.000
Good faith of broker . . . 43.060; 43.070
Implied brokerage contract . . . 43.010
Procuring cause . . . 43.020-43.040
Ready, willing, and able . . . 43.050
Rival brokers, procuring cause . . . 43.030; 43.040
Seller not sole owner . . . 43.080

**BURDEN OF PROOF**
Agency, employment, and similar relationships . . . 8.020
Assault and battery . . . 36.050; 36.060
Bailments . . . 28.070; 28.071
Contracts . . . 45.000; 45.005
Contributory negligence . . . 6.040
False imprisonment . . . 38.060; 38.070
Fraud . . . 39.070
Insurance
Accident and sickness insurance coverage . . . 47.530; 47.540
Cancellation by insurer . . . 47.120
Existence of policy . . . 47.080
Recovery under policy . . . 47.130
Suicide . . . 47.810
Malicious prosecution where defendant is merchant . . . 41.135
Negligence . . . 3.000; 4.010; 4.015; 6.110
Will contests . . . 48.000

[References are to Instruction Numbers.]

**BUSINESS RELATIONSHIPS**
Agency and employment (See AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS)
Conspiracy to harm a trade or business or profession (See CONSPIRACY TO HARM IN TRADE, BUSINESS OR PROFESSION)
Contracts (See CONTRACTS)
Wrongful or tortious interference (See INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP, WRONGFUL OR TORTIOUS)

## C

**CANCELLATION BY INSURER**
Insurance . . . 47.120

**CAPACITY OR INCAPACITY**
Common carriers, duty of care owed to incapacitated passenger . . . 22.010
Will contests . . . 48.040

**CARRIERS** (See COMMON CARRIERS)

**CAUSATION**
Definitions . . . 5.000; 5.010
Federal Employers' Liability Act . . . 21.010
Superseding cause, definition of . . . 5.010

**CERTAINTY AND DEFINITENESS**
Contracts . . . 45.170

**CHANGE OR MODIFICATION**
Contracts . . . 45.420
Lane of travel, changing
Generally . . . 10.160; 10.210
Stationary emergency vehicle, duty when approaching . . . 11.035
Signal, motor vehicles changing course after . . . 10.210

**CHILDREN**
Occupant's duty of care to . . . 23.080

**CIRCUMSTANTIAL EVIDENCE**
General instructions . . . 2.100

**CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS** (See SEXUALLY VIOLENT PREDATORS, CIVIL COMMITMENT OF)

**CLEARANCE**
Motor vehicles, overtaking and passing . . . 10.180

**CLEAR AND CONVINCING EVIDENCE**
Definition of . . . 3.110
Fraud . . . 39.070

**COLLATERAL SOURCE RULE**
Damages, effect on . . . 9.015

**COMMITMENT OF SEXUALLY VIOLENT PREDATORS** (See SEXUALLY VIOLENT PREDATORS, CIVIL COMMITMENT OF)

**COMMON CARRIERS**
Assault, duty to protect passengers from . . . 22.020; 22.030

**COMMON CARRIERS**—Cont.
Disorderly persons, authority to eject . . . 22.040
Duty of care, generally . . . 22.000; 22.010
Duty of delivering carrier to employee of consignee . . . 20.005
Eject disorderly persons, authority to . . . 22.040
Employee of consignee, railroad carrier's duty to . . . 20.000
Incapacitated passenger, duty of care owed to . . . 22.010
Inception of passenger-carrier relationship . . . 22.050
Termination of passenger-carrier relationship . . . 22.060

**COMMUNICATION OF ACCEPTANCE**
Contracts . . . 45.070

**COMPARATIVE NEGLIGENCE**
Contributory negligence . . . 6.050
Railroad crossings . . . 18.090

**COMPETENCE OF PARTIES**
Contracts . . . 45.160

**COMPLETENESS**
Contracts . . . 45.170

**COMPROMISE AND SETTLEMENT**
Accord and satisfaction
Statutory . . . 44.015
Uniform Commercial Code . . . 44.010
Contractual settlements, generally . . . 44.000
Evidence of liability, compromise negotiations as . . . 44.030
Fraud, rescission of agreement for . . . 44.020
Liability insurance . . . 47.710
Rescission of agreement . . . 44.020
Statutory accord and satisfaction . . . 44.015
Uniform Commercial Code . . . 44.010

**CONCEALMENT**
Malicious prosecution . . . 41.070

**CONCURRING NEGLIGENCE**
Generally . . . 4.020

**CONSENT**
Professional liability
Termination of services by consent . . . 35.030
Treatment without consent . . . 35.070-35.090

**CONSEQUENTIAL DAMAGES**
Contracts . . . 45.530

**CONSIDERATION**
Contracts . . . 45.040; 45.120-45.150

**CONSPIRACY TO HARM IN TRADE, BUSINESS OR PROFESSION**
Finding instructions . . . 40.350
Issues . . . 40.300

**CONSTRUCTION AND INTERPRETATION**
Contracts . . . 45.300-45.330

**CONSTRUCTIVE FRAUD**
Definition . . . 39.040

[References are to Instruction Numbers.]

**CONSTRUCTIVE FRAUD**—Cont.
Finding instructions . . . 39.100; 39.110

**CONTINUOUS DRIVING OVER 13 HOURS**
Control of motor vehicle . . . 10.050

**CONTRACTS**
Acceptance . . . 45.030; 45.070; 45.080
Adequacy of consideration . . . 45.120
Bailments (See BAILMENTS)
Burden of proof . . . 45.000; 45.005
Buyer's damages, breach of contract to sell property . . . 45.560
Certainty and definiteness . . . 45.170
Communication of acceptance . . . 45.070
Competence of parties . . . 45.160
Completeness . . . 45.170
Compromise and settlement . . . 44.000-44.030
Consequential damages . . . 45.530
Consideration . . . 45.040; 45.120-45.150
Construction and interpretation . . . 45.300-45.330
Construction contract, implied warranty in . . . 35.300
Counteroffer . . . 45.100
Custom and usage . . . 45.340
Damages, generally . . . 45.500-45.560
Definition . . . 45.010
Drafter, construction against . . . 45.310
Duress . . . 45.470
Ejusdem generis, construction and interpretation . . . 45.320
Evidence of damages . . . 45.510
Expectancy of contract (See subhead: Interference, wrongful or tortious)
Express contract . . . 45.200
Finding instructions . . . 45.600; 45.610
Fraud in the inducement . . . 45.480
Implied contract . . . 45.210
Implied promise to pay for services . . . 45.230
Implied warranty, construction contract and . . . 35.300
Impossibility as defense . . . 45.450
Intent . . . 45.190
Interference, wrongful or tortious
  Expectancy of contract
    Finding instructions . . . 40.250
    Issues . . . 40.200
  Not terminable at will
    Finding instructions . . . 40.150
    Issues . . . 40.100
Issues, generally . . . 45.000; 45.005
Liquidated damages . . . 45.540
Material breach . . . 45.400
Meeting of minds . . . 45.090
Mitigation of damages . . . 45.550
Modification . . . 45.420
Mutuality of obligation . . . 45.180
Mutual rescission . . . 45.430
Nominal damages . . . 45.520
Not suing as consideration . . . 45.150
Not terminable at will (See subhead: Interference, wrongful or tortious)
Offer . . . 45.020
Ordinary meaning of words, construction and interpretation . . . 45.305

**CONTRACTS**—Cont.
Past act as consideration . . . 45.140
Practical construction by parties . . . 45.330
Preventing performance . . . 45.440
Prior legal duty as consideration . . . 45.130
Quantum meruit . . . 45.570
Reasonable proof of damages . . . 45.510
Rescission . . . 45.430
Specified time for acceptance . . . 45.050
Third party cases . . . 45.005; 45.610
Time for acceptance . . . 45.050; 45.060
Undue influence . . . 45.460
Waiver . . . 45.410
Withdrawing offer . . . 45.110

**CONTRIBUTORY NEGLIGENCE**
Burden of proof . . . 6.040
Comparative negligence . . . 6.050
Death by wrongful act, contributory negligence of beneficiary . . . 9.110
Defense, availability of . . . 6.055
Definition of contributory negligence . . . 6.000
Federal Employers' Liability Act . . . 21.030
Fourteen and seventeen years of age, minors between . . . 6.030
Fourteen years of age, children under . . . 6.010
Intoxicated drivers, riding with . . . 15.010
Ordinary care, right to assume . . . 6.060
Parties' negligence not compared . . . 6.050
Presumption of ordinary care . . . 6.060
Railroads . . . 21.030
Seven to thirteen years of age, children between . . . 6.020
Seven years of age, children under . . . 6.005
Wild animals . . . 29.040

**CONTROL OF MOTOR VEHICLES**
Brake requirements . . . 10.070
Continuous driving over 13 hours . . . 10.050
Falling sleep . . . 10.060
Operation, generally . . . 10.000
Skidding . . . 10.040

**COUNTEROFFER**
Contracts . . . 45.100

**CREDIBILITY OF WITNESSES**
General instructions . . . 2.020

**CRIMINAL PROCEEDINGS**
Malicious prosecution, instituting criminal proceedings . . . 41.010

**CROSSINGS**
Railroad crossings (See RAILROADS)

**CUSTOM AND USAGE**
Contracts . . . 45.340

## D

**DAMAGES**
Aggravation of pre-existing condition . . . 9.030; 9.040; 21.015
Assault and battery, compensatory damages . . . 36.090

[References are to Instruction Numbers.]

**DAMAGES**—Cont.
Collateral source rule, effect of . . . 9.015
Compensatory damages . . . 9.000-9.120
Consequential damages in contract actions . . . 45.530
Contracts, generally . . . 45.500-45.560
Contributory negligence of beneficiary, death by wrongful act . . . 9.110
Death by wrongful act . . . 9.100; 9.105; 9.110
Defamation . . . 37.100-37.130
Direct . . . 45.500
Eminent domain, damage to residue . . . 46.070; 46.090; 46.100
Evidence . . . 9.010; 45.510
General personal injury and property damage . . . 9.000
Liquidated damages in contract actions . . . 45.540
Malice, definition of . . . 9.090
Malicious prosecution . . . 41.140; 41.150
Mitigation of damages
Contracts . . . 45.550
Defamation . . . 37.120; 37.130
Duty as to . . . 9.020
Eminent domain . . . 46.120
Professional liability . . . 35.110
Mortality tables . . . 9.120
Nominal damages in contract actions . . . 45.520
Nuisance, measure of damages . . . 26.030; 26.040
Personal injury and property damage . . . 9.000
Physician, aggravation of injuries by . . . 9.040
Pre-existing condition, aggravation of . . . 9.030; 9.040
Property damage (See PROPERTY DAMAGE)
Punitive damages
Defamation . . . 37.110; 37.111
Definition of common law actual malice . . . 9.090
General instruction . . . 9.080
Malice, definition of . . . 9.090
Malicious prosecution . . . 41.150
Motor vehicles, intoxicated drivers . . . 15.005
Wrongful act, death by . . . 9.105
Reasonable proof . . . 9.010
Trespass . . . 27.040
Waste, double damages for . . . 24.050
Wrongful act, death by . . . 9.100; 9.105

**DANGEROUS INSTRUMENTALITIES**
Children, occupant's duty to . . . 23.080
Duty of care, generally . . . 30.000
Electricity
Inspect and repair, duty to . . . 30.030
Insulate wires, duty to . . . 30.050
Repair, duty to inspect and . . . 30.030
Withhold supply and inspect, duty to . . . 30.040
Explosives . . . 30.010
Gas
Inspect and repair, duty to . . . 30.030
Repair, duty to inspect and . . . 30.030
Withhold supply and inspect, duty to . . . 30.045
Inspection and repair duty as to electricity and gas . . . 30.030
Insulating electric wires, duty as to . . . 30.050
Occupant's duty of care to children . . . 23.080
Owners and occupants responsibility for dangerous substances on premises . . . 23.120

**DANGEROUS INSTRUMENTALITIES**—Cont.
Strict liability for blasting damage from explosives . . . 30.010

**DEAD MAN'S ACT**
General instruction . . . 2.240

**DEATH AND DEATH ACTIONS**
Damages . . . 9.100-9.110
Life insurance, accidental death . . . 47.820

**DEFAMATION**
Apology, mitigation of damages . . . 37.130
Damages . . . 37.100-37.130
Danger to private plaintiff's reputation apparent . . . 37.020
Falsity . . . 37.095
Finding instructions . . . 37.090; 37.095-37.098
Insulting words . . . 37.030
Issues . . . 37.000
Malice . . . 37.000; 37.090
Merchant, probable cause . . . 37.060
Mitigation of damages . . . 37.120; 37.130
Not defamation per se . . . 37.010
Privilege . . . 37.050
Punitive damages . . . 37.110; 37.111

**DEFENSES**
Assault and battery . . . 36.050-36.080
Contributory negligence . . . 6.055
False imprisonment . . . 38.060-38.090
Insurance . . . 47.140
Striking of defense by judge, effect of . . . 2.210

**DEFINITIONS**
Accidental . . . 47.500
Agency, employment, and similar relationships (See AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS)
Appointed agent . . . 47.000
Assault . . . 36.010
Assumption of risk . . . 6.100
Bailee . . . 28.000
Bailments . . . 28.000
Bailor . . . 28.000
Battery . . . 36.000
Business joint venture . . . 8.120
Clear and convincing evidence . . . 3.110
Common law actual malice . . . 9.090
Constructive fraud . . . 39.040
Contract . . . 45.010
Contributory negligence . . . 6.000
Employer and employee . . . 8.000
False imprisonment . . . 38.000
Greater weight of evidence . . . 3.100
Gross negligence . . . 4.030
Independent contractor . . . 8.100
Intentional act . . . 47.515
Intentional misrepresentation . . . 39.000
Invitee . . . 23.020
Licensee
Generally . . . 23.010
Bare licensee . . . 23.015
Limited access highway . . . 46.150

[References are to Instruction Numbers.]

**DEFINITIONS**—Cont.
Malice . . . 41.020
Malicious prosecution . . . 41.000
Material fact . . . 39.020
Mental abnormality . . . 49.300
Misrepresentation . . . 39.010
Negligence . . . 4.000
Non to business joint venture . . . 8.130
Nuisance . . . 26.000; 26.020
Partnership . . . 8.150
Personality disorder . . . 49.300
Probable cause . . . 41.040
Proximate cause . . . 5.000
Punitive damages, common law actual malice . . . 9.090
Ready, willing, and able . . . 43.050
Reliance . . . 39.030
Sexually violent offense . . . 49.200
Superseding cause . . . 5.010
Trespass . . . 27.000
Trespasser . . . 23.000
Unreasonably dangerous product . . . 34.076
Warranty . . . 34.000; 34.320
Will . . . 48.010
Willful and wanton conduct . . . 4.040

**DELAY**
False imprisonment, delay after arrest . . . 38.030

**DESCRIPTION**
Express warranty by . . . 34.030

**DESIGN**
Manufacturer's duty . . . 34.140

**DISABLED VEHICLES**
Duty to set out warning devices . . . 10.360

**DISCHARGE OF ATTORNEY**
Quantum meruit recovery . . . 42.060

**DISORDERLY PERSONS**
Eject disorderly persons from common carriers, authority to . . . 22.040

**DISPUTED LOSS**
Measure of damages . . . 9.070
Property damage . . . 9.070

**DOG OWNERS**
Duties of . . . 29.020

**DON'T WALK SIGNALS**
Pedestrians' duties . . . 14.050

**DOUBLE DAMAGES**
Waste . . . 24.050

**DRAFTER OF CONTRACT**
Construction against . . . 45.310

**DRUNK DRIVERS**
Assumption of risk in riding with . . . 15.020
Contributory negligence in riding with . . . 15.010
Driving under influence . . . 15.000
Punitive damages . . . 15.005

**DURESS**
Contracts . . . 45.470

## E

**EJUSDEM GENERIS**
Construction and interpretation . . . 45.320

**ELECTRICITY**
Dangerous instrumentalities . . . 30.030; 30.040; 30.050

**EMERGENCIES**
Professional liability . . . 35.090

**EMERGENCY VEHICLES**
Speed limits . . . 11.010
Standard of care . . . 11.000; 11.005
Traffic regulations . . . 11.020
Yielding duty
Generally . . . 11.030
Stationary emergency vehicle, approaching . . . 11.035

**EMINENT DOMAIN**
Access, lost . . . 46.080
Damage to residue . . . 46.070; 46.090; 46.100
Date of determination of just compensation . . . 46.040
Definition of limited access highway . . . 46.150
Enhancement of damages . . . 46.090
Fair market value . . . 46.050; 46.060
Highway condemnation . . . 46.150
Jurors' duties, scope of . . . 46.000
Just compensation . . . 46.010-46.040
Limited access highway . . . 46.150
Majority awards . . . 46.140
Mitigation of damages . . . 46.120
Profits, lost . . . 46.085
"Quotient" awards . . . 46.130
Report, elements of . . . 46.180
Residue, damage to . . . 46.010-46.030
Scope of commissioner's duties . . . 46.000
Use of property, fair market value . . . 46.060
Weight of testimony as to value . . . 46.110

**EMOTIONAL DISTRESS**
Intentional infliction of
Finding instructions . . . 33.300
Issues . . . 33.200
Negligent infliction of
Finding instructions . . . 33.100
Issues . . . 33.000

**EMPLOYMENT** (See AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS)

**ENHANCEMENT OF DAMAGES**
Eminent domain . . . 46.090

**ENTRUSTMENT**
Special negligence doctrines . . . 7.010

**EQUIPMENT**
Motor vehicles . . . 17.000-17.090

[References are to Instruction Numbers.]

**ESSENTIAL ELEMENTS**
Insurance contract . . . 47.090

**ESTATE**
General instruction, verdict against estate . . . 2.240

**ESTOPPEL AND WAIVER**
Contracts . . . 45.410
Insurance . . . 47.150; 47.160; 47.180

**EVIDENCE**
Amount sued for . . . 2.180
Circumstantial evidence . . . 2.100
Clear and convincing evidence . . . 3.110
Compromise negotiations as evidence of liability . . . 44.030
Contracts . . . 45.510
Damages . . . 9.010; 45.510
Eminent domain . . . 46.110
General instructions
  Amount sued for . . . 2.180
  Circumstantial evidence . . . 2.100
  Rejected or stricken evidence . . . 2.170
Greater weight of evidence, definition of . . . 3.100
Insurance, proof of loss . . . 47.180; 47.190
Rejected or stricken evidence . . . 2.170
Sexually violent predators, civil commitment of . . . 49.100
Standard of proof . . . 3.100; 3.110
Weight of evidence . . . 3.100; 46.110

**EXCEEDING SPEED LIMIT**
Motor vehicles . . . 10.080

**EXCLUSIONS**
Accident and sickness insurance coverage . . . 47.540

**EXECUTION OF WILL**
Will contests . . . 48.020

**EXPERT WITNESSES**
General instructions . . . 2.040
Professional liability . . . 35.050
Sexually violent predators, civil commitment of . . . 49.400

**EXPLOSIVES AND EXPLOSIONS**
Dangerous instrumentalities . . . 30.010
Railroad crossings, duties of drivers carrying explosives . . . 18.060

## F

**FAIR MARKET VALUE**
Eminent domain . . . 46.050; 46.060

**FALSE ADVERTISING**
Finding instruction . . . 40.450
Issues . . . 40.400

**FALSE IMPRISONMENT**
Burden of proof . . . 38.060; 38.070
Defenses . . . 38.060-38.090
Definition . . . 38.000
Delay after arrest . . . 38.030
Finding instructions . . . 38.080; 38.090

**FALSE IMPRISONMENT**—Cont.
Good faith defense . . . 38.010
Lawful arrest . . . 38.020
Probable cause . . . 38.045
Shoplifting . . . 38.040; 38.045
Willful concealment . . . 38.040

**FALSE OR FALSITY**
Defamation . . . 37.095
Insurance application, untrue statements in . . . 47.210

**FARM ANIMALS**
Owner's duty . . . 29.000

**FEDERAL EMPLOYERS' LIABILITY ACT**
Causation . . . 21.010
Contributory negligence . . . 21.030
Duty of care . . . 21.000
Employee's duty of care . . . 21.020
Federal Safety Appliance Act . . . 21.040
Finding instructions . . . 21.050
Present value . . . 21.060
Railroads (See RAILROADS)

**FEDERAL SAFETY APPLIANCE ACT**
Generally . . . 21.040

**FINDING INSTRUCTIONS**
Assault and battery . . . 36.070; 36.080
Bailments . . . 28.080; 28.081
Business
  Conspiracy to harm a trade or business or profession . . . 40.350
  Interference, wrongful or tortious
    Business relationship . . . 40.250
    Contract not terminable at will . . . 40.150
Constructive fraud . . . 39.100; 39.110
Contracts
  Generally . . . 45.600; 45.610
  Not terminable at will, wrongful or tortious interference with contract . . . 40.150
Defamation . . . 37.090; 37.095
Emotional distress
  Intentional infliction of . . . 33.300
  Negligent infliction of . . . 33.100
False advertising . . . 40.450
False imprisonment . . . 38.080; 38.090
Federal Employers' Liability Act . . . 21.050
Fraud . . . 39.090-39.110
Intentional infliction of emotional distress . . . 33.300
Interference, wrongful or tortious (See subhead: Business)
Malicious prosecution . . . 41.130; 41.136
Multiple defendants . . . 3.060
Municipal corporations, liability of . . . 32.050
Negligence . . . 3.050
Negligent infliction of emotional distress . . . 33.100
Rear end collision . . . 10.005
Sexually violent predators, civil commitment of . . . 49.000
Streets, sidewalks and bridges . . . 32.050
Will contests . . . 48.090
Wrongful or tortious interference (See subhead: Business)

[References are to Instruction Numbers.]

**FIRE FIGHTERS**
Occupant's duty to . . . 23.130

**FIRES**
Railroads' liability for fires started by train . . . 20.010

**FITNESS FOR A PARTICULAR PURPOSE**
Warranty of . . . 34.040; 34.050

**FLAGS**
Motor vehicles, flag at end of load . . . 17.070

**FOLLOWING ANOTHER VEHICLE**
Duty of driver . . . 10.004

**FOOD AND FOOD PRODUCTS**
Implied warranty of wholesomeness . . . 34.090

**FOREIGN OBJECTS**
Removal of . . . 23.050

**FORFEITURE OR PENALTY**
Insurance, estoppel to assert forfeiture . . . 47.160
Motor vehicles, forfeiture of right of way . . . 10.295

**FOURTEEN AND SEVENTEEN YEARS OF AGE**
Contributory negligence of minors . . . 6.030

**FOURTEEN YEARS OF AGE**
Contributory negligence of children under . . . 6.010

**FRAUD**
Burden of proof . . . 39.070
Clear and convincing evidence . . . 39.070
Compromise and settlement, rescission of agreement for fraud . . . 44.020
Constructive fraud, definition of . . . 39.040
Contracts, fraud in the inducement . . . 45.480
Definitions
- Constructive fraud . . . 39.040
- Intentional misrepresentation . . . 39.000
- Material fact . . . 39.020
- Misrepresentation . . . 39.010
- Reliance . . . 39.030

Factors to consider . . . 39.080
Finding instructions . . . 39.090-39.110
Intentional misrepresentation, definition . . . 39.000
Investigation duty . . . 39.050
Opinions . . . 39.060
Prompt action, duty to take . . . 39.045
Reliance, definition . . . 39.030

## G

**GAS**
Dangerous instrumentalities . . . 30.030; 30.045

**GENERAL INSTRUCTIONS**
Admission of liability by defendant, effect of . . . 2.200
Adverse witness . . . 2.030
"Allen Charge" . . . 2.250
Amount sued for as evidence . . . 2.180
Bias, verdict not to be based on . . . 2.220
Circumstantial evidence . . . 2.100
Credibility of witnesses . . . 2.020

**GENERAL INSTRUCTIONS**—Cont.
Damages, general personal injury and property damage . . . 9.000
Dead Man's Act . . . 2.240
Defense stricken by judge, effect of . . . 2.210
Estate, verdict against . . . 2.240
Evidence
- Amount sued for . . . 2.180
- Circumstantial evidence . . . 2.100
- Rejected or stricken evidence . . . 2.170

Expert witnesses . . . 2.040
Guesswork, verdict not to be based on . . . 2.220
Own testimony, party bound by . . . 2.060
Party, prior inconsistent statements . . . 2.135
Peremptory instruction . . . 2.190
Preliminary instructions to jury . . . 2.000
Prior convictions . . . 2.140
Prior inconsistent statements . . . 2.130; 2.135
Rejected or stricken evidence . . . 2.170
Speculation, verdict not to be based on . . . 2.220
Stricken evidence . . . 2.170
Striking of defense by judge, effect of . . . 2.210
Sympathy, verdict not to be based on . . . 2.220
Unexplained failure to produce important witness . . . 2.080
Verdict
- "Allen Charge" . . . 2.250
- Estate, verdict against . . . 2.240
- Sympathy, bias, guesswork or speculation, verdict not to be based on . . . 2.220

View by jury . . . 2.090
Witnesses
- Adverse witness . . . 2.030
- Credibility of . . . 2.020
- Expert witnesses . . . 2.040
- Prior inconsistent statements . . . 2.130
- Unexplained failure to produce . . . 2.080

**GOOD FAITH**
Brokers . . . 43.060; 43.070
False imprisonment, good faith defense . . . 38.010

**GOOD SAMARITANS**
Professional liability . . . 35.120

**GRATUITOUS BAILMENT**
Generally . . . 28.030

**GREATER WEIGHT OF EVIDENCE**
Definition of . . . 3.100

**GREEN LIGHT**
Motor vehicles . . . 10.264

**GROSS NEGLIGENCE**
Definition of . . . 4.030

**GUESSWORK**
Verdict not to be based on . . . 2.220

## H

**HALF OF ROAD**
Duty to drive on . . . 10.130

[References are to Instruction Numbers.]

**HARMING A TRADE OR BUSINESS OR PROFESSION** (See CONSPIRACY TO HARM IN TRADE, BUSINESS OR PROFESSION)

**HEADLIGHTS**
Motor vehicles . . . 17.000

**HEALTH CARE PROVIDERS**
Aggravation of injuries by . . . 9.040
Professional liability (See PROFESSIONAL LIABILITY)

**HELPLESS PLAINTIFF**
Last clear chance . . . 7.030

**HIGHWAYS AND STREETS**
Eminent domain . . . 46.150
Municipal corporations, liability of (See MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES)

**HIRED VEHICLE DRIVERS**
Railroad crossings . . . 18.060

**HORNS**
Motor vehicles . . . 17.030
Railroad's duty to sound . . . 18.080; 18.081

**HOSPITALS**
Professional liability . . . 35.130

**HOTELS AND MOTELS**
Accommodations, duty to provide . . . 25.000
Duty of care of innkeeper, generally . . . 25.010

## I

**ICE AND SNOW, DUTY TO REMOVE**
Landlord and tenant . . . 24.030
Owners and occupants . . . 23.110

**IMPLIED ACTS OR MATTERS**
Brokers . . . 43.010
Contracts . . . 45.210; 45.230
Warranties . . . 34.040-34.070; 34.090

**IMPOSSIBILITY**
Contracts, defense of impossibility . . . 45.450

**IMPUTING NEGLIGENCE**
Bailments . . . 28.060

**INCEPTION**
Insurance contract . . . 47.110
Passenger-carrier relationship . . . 22.050

**INDEPENDENT CONTRACTORS**
Generally . . . 8.100; 8.110

**INDIVISIBLE INJURY**
Negligence . . . 4.025

**INFLAMMABLES**
Railroad crossings, duties of drivers carrying inflammables . . . 18.060

**INFLICTION OF EMOTIONAL DISTRESS**
Intentional infliction
  Finding instruction . . . 33.300
  Issues . . . 33.200
Negligent infliction
  Finding instructions . . . 33.100
  Issues . . . 33.000

**INSPECTION DUTY**
Dangerous instrumentalities . . . 30.030; 30.040; 30.045
Products liability . . . 34.170

**INSTITUTING CRIMINAL PROCEEDINGS**
Malicious prosecution . . . 41.010

**INSULATING ELECTRIC WIRES**
Duty as to . . . 30.050

**INSULTING WORDS**
Defamation . . . 37.030

**INSURANCE**
Accidental death . . . 47.820
Accident and sickness insurance . . . 47.500-47.550
Agents and agency . . . 47.000-47.070
Aggressor, accident and sickness insured as . . . 47.510
Answers recorded by agent . . . 47.220
Apparent authority of agent . . . 47.040
Application, untrue statements in . . . 47.210
Appointed agent . . . 47.000
Binding character of agent's acts . . . 47.030; 47.070
Burden of proof
  Accident and sickness insurance coverage . . . 47.530; 47.540
  Cancellation by insurer . . . 47.120
  Existence of policy . . . 47.080
  Recovery under policy . . . 47.130
  Suicide . . . 47.810
Cancellation by insurer . . . 47.120
Collateral source rule, effect on damages of . . . 9.015
Death by accident, life insurance . . . 47.820
Defenses, loss not covered . . . 47.140
Definitions
  Accidental . . . 47.500
  Appointed agent . . . 47.000
  Intentional act . . . 47.515
Essential elements of insurance contract . . . 47.090
Estoppel and waiver . . . 47.150; 47.160; 47.180
Exclusions, accident and sickness insurance coverage . . . 47.540
False statements in application . . . 47.210
Forfeiture, estoppel to assert . . . 47.160
Inception of insurance contract . . . 47.110
Knowledge (See subhead: Notice or knowledge)
Liability insurance . . . 47.700; 47.710
Life insurance . . . 47.810; 47.820
Limits on agent's authority . . . 47.050
Motor vehicles, uninsured motorists . . . 16.000; 16.010
Municipality as insurer . . . 32.030
Notice or knowledge
  Agent's knowledge as binding insurer . . . 47.070

[References are to Instruction Numbers.]

**INSURANCE**—Cont.
Notice or knowledge—Cont.
Issuing policy with knowledge of breach . . . 47.170
Reasonable time for notice to insurer . . . 47.200
Oral contracts and binders . . . 47.100
Permanent total disability, accident and sickness insurance . . . 47.520
Permissive use omnibus clause, liability insurance . . . 47.700
Pre-existing conditions . . . 47.550; 47.820
Proof of loss . . . 47.180; 47.190
Ratification of agent's acts . . . 47.060
Reasonable time for notice to insurer . . . 47.200
Recovery under policy . . . 47.130
Renewal policy . . . 47.125
Settlement duty, liability insurance . . . 47.710
Streets, sidewalks and bridges, municipality as insurer for . . . 32.030
Suicide . . . 47.810
Untrue statements in application . . . 47.210
Waiver and estoppel . . . 47.150; 47.160; 47.180

**INTENT OR INTENTIONAL**
Agency, employment, and similar relationships . . . 8.060
Contracts . . . 45.190
Fraud, definition of intentional . . . 39.000
Will contests . . . 48.030

**INTERFERENCE WITH CONTRACTS, WRONGFUL OR TORTIOUS** (See CONTRACTS, subhead: Interference, wrongful or tortious)

**INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP, WRONGFUL OR TORTIOUS**
Finding instructions . . . 40.250
Issues . . . 40.200

**INTERSECTIONS**
Motor vehicle drivers . . . 10.280; 10.290; 14.030

**INTOXICATED DRIVERS**
Assumption of risk in riding with . . . 15.020
Contributory negligence in riding with . . . 15.010
Driving under influence . . . 15.000
Punitive damages . . . 15.005

**INVESTIGATION DUTY**
Fraud . . . 39.050

**INVITEES**
Definition of . . . 23.020
Exceeding scope of invitation . . . 23.100
Occupant's duty to . . . 23.040; 23.050
Owners and occupants (See OWNERS AND OCCUPANTS)
Safe condition of premises, right to assume . . . 23.030

## J

**JOINT ENTERPRISE OR JOINT VENTURE**
Agency, employment, and similar relationships . . . 8.120-8.140

**JOINT ENTERPRISE OR JOINT VENTURE**—Cont.
Right of control . . . 8.140

**JURY**
Eminent domain . . . 46.000
Sexually violent predators, civil commitment of . . . 49.400
Verdict
"Allen Charge" . . . 2.250
Estate, verdict against . . . 2.240
Sympathy, bias, guesswork or speculation, verdict not to be based on . . . 2.220
View by jury, general instructions . . . 2.090

**JUST COMPENSATION**
Eminent domain . . . 46.010-46.040

## K

**KNOWLEDGE** (See NOTICE OR KNOWLEDGE)

## L

**LABELS AND LABELING**
Products liability, warranties . . . 34.070

**LANDLORD AND TENANT**
Double damages for waste . . . 24.050
Failure to exercise reasonable care in making repairs, burden of proving landlord's . . . 24.025
Ice and snow, duty to remove . . . 24.030
Maintaining common areas, landlord's duty as to . . . 24.010
Repairs made, landlord's liability for . . . 24.020
Snow and ice, duty to remove . . . 24.030
Surrendering control, landlord's duty upon . . . 24.000
Waste . . . 24.040; 24.050

**LANE OF TRAVEL**
Changing lanes
Generally . . . 10.160; 10.210
Stationary emergency vehicle, duty when approaching . . . 11.035
Defendant in plaintiff's lane . . . 10.115
Markings, duty to heed . . . 10.140
Slow moving vehicles . . . 10.120
Three lane roads . . . 10.150

**LAST CLEAR CHANCE**
Helpless plaintiff . . . 7.030
Inattentive plaintiff . . . 7.040

**LEFT TURNS**
Motor vehicles . . . 10.240-10.260

**LIABILITY INSURANCE**
Generally . . . 47.700; 47.710

**LICENSEE**
Bare licensee
Definition of . . . 23.015
Occupant's duty to trespasser and bare licensee . . . 23.090

[References are to Instruction Numbers.]

**LICENSEE**—Cont.
Definition of
Generally . . . 23.010
Bare licensee . . . 23.015
Occupant's duty to . . . 23.060; 23.070
Social guest (See SOCIAL GUEST)
Trespass and trespassers (See TRESPASS AND TRESPASSERS)

**LIFE EXPECTANCY TABLES**
Damages . . . 9.120

**LIFE INSURANCE**
Generally . . . 47.810; 47.820

**LIGHTS AND LIGHTING**
Brake lights . . . 17.020
End of load, lights at . . . 17.070
Headlights . . . 17.000
Lookout duty of motorists . . . 10.030
Tail lights . . . 17.010

**LIMITATIONS AND RESTRICTIONS**
Insurance agent's authority . . . 47.050

**LIMITED ACCESS HIGHWAY**
Eminent domain . . . 46.150

**LIQUIDATED DAMAGES**
Contracts . . . 45.540

**LOADS AND LOADING**
Motor vehicles . . . 17.070; 17.080

**LOOKOUT**
Motor vehicles
Lights, duty as to . . . 10.030
Operation, generally . . . 10.000
Scope of duty . . . 10.020
Windows, duty as to . . . 10.025
Railroad crossings . . . 18.000-18.030; 18.130

## M

**MAINTAINING COMMON AREAS**
Landlord's duty as to . . . 24.010

**MAJORITY AWARDS**
Eminent domain . . . 46.140

**MALICE**
Defamation . . . 37.000
Malicious prosecution . . . 41.020; 41.035
Punitive damages . . . 9.090

**MALICIOUS PROSECUTION**
Advice of counsel . . . 41.080
Burden of proof where defendant is merchant, issues and allocation of . . . 41.135
Compensatory damages . . . 41.140
Concealment . . . 41.070
Criminal proceedings, instituting . . . 41.010
Damages . . . 41.140; 41.150
Definitions . . . 41.000; 41.020; 41.040
Finding instructions . . . 41.130; 41.136
Instituting criminal proceedings . . . 41.010
Lack of malice . . . 41.035
Malice . . . 41.020; 41.035
Merchants
Burden of proof where defendant is merchant, issues and allocation of . . . 41.135
Finding instructions where defendant is merchant . . . 41.136
Probable cause . . . 41.040-41.080
Punitive damages . . . 41.150
Shoplifting . . . 41.070
Stipulated elements . . . 41.110
Willful concealment . . . 41.070

**MANUFACTURER'S DUTY**
Products liability . . . 34.140-34.155

**MARKINGS**
Motor vehicles, lane of travel . . . 10.140

**MEDICAL EMERGENCY**
Special negligence doctrines . . . 7.005

**MEDICAL PROFESSIONALS**
Professional liability (See PROFESSIONAL LIABILITY)

**MEDICATIONS**
Products liability, warning duty . . . 34.155

**MEETING OF MINDS**
Contracts . . . 45.090

**MERCHANTABILITY**
Products liability, warranties . . . 34.060; 34.070; 34.080

**MERCHANTS**
Defamation . . . 37.060
Malicious prosecution
Burden of proof where defendant is merchant, issues and allocation of . . . 41.135
Finding instructions where defendant is merchant . . . 41.136

**MINIMUM SPEED**
Motor vehicles . . . 10.090

**MIRRORS**
Motor vehicles . . . 17.050

**MISUSE**
Products liability . . . 34.100; 34.200

**MITIGATION OF DAMAGES**
Contracts . . . 45.550
Defamation . . . 37.120; 37.130
Duty as to . . . 9.020
Eminent domain . . . 46.120
Professional liability . . . 35.110

**MODIFICATION OR CHANGE**
Contracts . . . 45.420
Lane of travel, changing
Generally . . . 10.160; 10.210
Stationary emergency vehicle, duty when approaching . . . 11.035

[References are to Instruction Numbers.]

**MODIFICATION OR CHANGE**—Cont.
Signal, motor vehicles changing course after . . . 10.210

**MORTALITY TABLES**
Damages . . . 9.120

**MOTELS AND HOTELS**
Accommodations, duty to provide . . . 25.000
Duty of care of innkeeper, generally . . . 25.010

**MOTOR VEHICLES**
Accident, stopping because of . . . 10.350
Airbags . . . 17.090
Amber lights . . . 10.266
Approaching school buses, duties of drivers . . . 12.040-12.070
Assumption of risk . . . 15.020
Brake lights . . . 17.020
Brakes . . . 10.070; 17.040
Changing course or lane of travel . . . 10.160; 10.210
Clearance, overtaking and passing . . . 10.180
Continuous driving over 13 hours . . . 10.050
Contributory negligence . . . 15.010
Control
  Brake requirements . . . 10.070
  Continuous driving over 13 hours . . . 10.050
  Falling sleep . . . 10.060
  Operation of vehicles, generally . . . 10.000
  Skidding . . . 10.040
  Sleep . . . 10.060
Disabled vehicles . . . 10.360
Don't walk signals . . . 14.050
Driving under influence (See subhead: Intoxicated drivers)
Emergency vehicles
  Speed limits . . . 11.010
  Standard of care . . . 11.000; 11.005
  Traffic regulations . . . 11.020
  Yielding duty
    Generally . . . 11.030
    Stationary emergency vehicle, approaching . . . 11.035
Equipment, generally . . . 17.000-17.090
Exceeding posted limit . . . 10.080
Flag at end of load . . . 17.070
Following another vehicle, duty of driver . . . 10.004
Forfeiture of right of way, unlawful speed . . . 10.295
Green lights . . . 10.264
Half of road, duty to drive on . . . 10.130
Headlights . . . 17.000
Horns . . . 17.030
Intersections
  Pedestrians, duty to . . . 14.030
  Yielding right of way . . . 10.280; 10.290
Intoxicated drivers
  Assumption of risk in riding with . . . 15.020
  Contributory negligence in riding with . . . 15.010
  Driving under influence . . . 15.000
  Punitive damages . . . 15.005
Lane of travel
  Changing lanes
    Generally . . . 10.160; 10.210

**MOTOR VEHICLES**—Cont.
Lane of travel—Cont.
  Changing lanes—Cont.
    Stationary emergency vehicle, duty when approaching . . . 11.035
  Defendant in plaintiff's lane . . . 10.115
  Markings, duty to heed . . . 10.140
  Slow moving vehicles . . . 10.120
  Three lane roads . . . 10.150
Left turns . . . 10.240-10.260
Lights and lighting
  Brake lights . . . 17.020
  End of load, lights at . . . 17.070
  Headlights . . . 17.000
  Lookout duty of motorists . . . 10.030
  Tail lights . . . 17.010
Loads and loading . . . 17.070; 17.080
Lookout
  Lights, duty as to . . . 10.030
  Operation, generally . . . 10.000
  Scope of duty . . . 10.020
  Windows, duty as to . . . 10.025
Markings, duty to heed . . . 10.140
Minimum speed . . . 10.090
Mirrors . . . 17.050
Obstructing highway, avoidance of . . . 10.330
Obstruction, pedestrians stepping from behind . . . 14.020
Ordinary care, right to assume . . . 10.010
Overtaking and passing . . . 10.170; 10.180
Passengers, duties of . . . 13.000; 13.010
Pedestrians
  Crossing highway or street . . . 14.040
  Don't walk signals . . . 14.050
  General duties of . . . 14.000
  Intersection or crossing, duty at . . . 14.030
  Obstruction, stepping from behind . . . 14.020
  Traveling along highway, duties of pedestrians . . . 14.010
Picking up or discharging students, school bus driver's duty . . . 12.000; 12.010; 12.030
Presumption of ordinary care . . . 10.010
Products liability, Motor Vehicle Warranty Enforcement Act . . . 34.300-34.320
Projection of load . . . 17.080
Punitive damages, intoxicated drivers . . . 15.005
Railroad crossings, school buses at . . . 18.060
Rear end collision . . . 10.005
Red lights . . . 10.262; 10.268
Right of way
  Forfeiture, unlawful speed . . . 10.295
  Stopping and yielding . . . 10.300
  Traffic circles . . . 10.310
Right side of road, duty to drive on . . . 10.110
Right turns . . . 10.230
School buses
  Approaching drivers, duties of . . . 12.040-12.070
  Picking up or discharging students, duty as to . . . 12.000; 12.010; 12.030
  Railroad crossings . . . 18.060
  Warning device, duty as to . . . 12.000; 12.010

[References are to Instruction Numbers.]

**MOTOR VEHICLES**—Cont.
Selling of merchandise, stopping on highway for purpose of . . . 10.340
Signals and signaling
Motor vehicles, generally . . . 10.190-10.210
Pedestrians, don't walk signals . . . 14.050
Skidding . . . 10.040
Slow moving vehicles . . . 10.100; 10.120
Sovereign immunity, emergency vehicles . . . 11.000-11.020
Speed
Driving too slowly . . . 10.100
Emergency vehicles
Sovereign immunity . . . 11.010
Stationary emergency vehicle, approaching . . . 11.035
Exceeding posted limit . . . 10.080
Forfeiture of right of way, unlawful speed . . . 10.295
Minimum speed . . . 10.090
Operation of vehicle, generally . . . 10.000
Slow driving . . . 10.100
Stopping distances . . . 10.105
Table of speed and stopping distances . . . 10.105
Standard of care, emergency vehicles . . . 11.000; 11.005
Steady red light . . . 10.262; 10.268
Stop and stopping
Accident, stopping because of . . . 10.350
Driver's duty not to stop on highway . . . 10.320
Railroad crossings . . . 18.050
Right of way . . . 10.300
Selling of merchandise . . . 10.340
Signaling by driver, duty as to . . . 10.190; 10.200
Speed, stopping distances . . . 10.105
Stop signs and signals . . . 10.200; 10.270
Tail lights . . . 17.010
Traffic circles . . . 10.310
Traffic regulations, emergency vehicles . . . 11.020
Turns and turning
Left turns . . . 10.240-10.260
Right turns . . . 10.230
Signals . . . 10.200
Yielding right of way . . . 10.240
Uncontrolled intersection, yielding right of way . . . 10.290
Uninsured motorists . . . 16.000; 16.010
Visibility, overtaking and passing . . . 10.170
Warnings
Devices, duty to set out warning . . . 10.360
Passengers' duties . . . 13.000
School buses, duty as to warning device . . . 12.000; 12.010
Windows, lookout duty . . . 10.025
Windshield wipers . . . 17.060
Yielding right of way
Emergency vehicles
Generally . . . 11.030
Stationary emergency vehicle, approaching . . . 11.035
Entering highway or crossing sidewalk, yielding before . . . 10.300
Signs at intersections . . . 10.270; 10.280

**MOTOR VEHICLES**—Cont.
Yielding right of way—Cont.
Turns and turning . . . 10.240
Uncontrolled intersections . . . 10.290

**MOTOR VEHICLE WARRANTY ENFORCEMENT ACT**
Products liability . . . 34.300-34.320

**MULTIPLE CAUSES**
Nuisance . . . 26.010

**MULTIPLE DEFENDANTS**
Finding instructions . . . 3.060

**MULTIPLE MOTIVES**
Agency, employment, and similar relationships . . . 8.050

**MUNICIPAL CORPORATIONS—GENERAL LIABILITY**
Proprietary functions . . . Ch. 31

**MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES**
Driver's right to assume safe condition . . . 32.020
Duty of care, generally . . . 32.000
Finding instructions . . . 32.050
Insurer, municipality as . . . 32.030
Notice of defect . . . 32.040
Pedestrian's right to assume safe condition . . . 32.020
Warning duty, generally . . . 32.010

**MUNICIPALITY AS INSURER**
Generally . . . 32.030

**MUTUAL BENEFIT**
Bailments . . . 28.010; 28.040

**MUTUALITY OF OBLIGATION**
Contracts . . . 45.180

**MUTUAL RESCISSION**
Contracts . . . 45.430

## N

**NEGLIGENCE**
Assumption of risk . . . 6.100; 6.110; 15.020
Bailments . . . 28.060
Breach of warranty by seller or manufacturer . . . 34.075
Burden of proof . . . 3.000; 4.010; 4.015; 6.110
Concurring negligence . . . 4.020
Contributory negligence (See CONTRIBUTORY NEGLIGENCE)
Definitions . . . 4.000; 6.100
Employee, employer's liability for negligence of . . . 8.010
Entrustment . . . 7.010
Fact of accident as not proof of negligence . . . 4.015
Finding instruction . . . 3.050
Forseeable consequences . . . 4.018
Gross negligence, definition of . . . 4.030
Helpless plaintiff . . . 7.030
Inattentive plaintiff . . . 7.040

[References are to Instruction Numbers.]

**NEGLIGENCE**—Cont.
Indivisible injury . . . 4.025
Infliction of emotional distress
Finding instructions . . . 33.100
Issues . . . 33.000
Issues . . . 3.000
Last clear chance
Helpless plaintiff . . . 7.030
Inattentive plaintiff . . . 7.040
Medical emergency . . . 7.005
Products liability, negligence per se . . . 34.180
Professional liability (See PROFESSIONAL LIABILITY)
Rescue . . . 7.020
Res ipsa loquitur . . . 7.050
Single, indivisible injury . . . 4.025
Special negligence doctrines . . . 7.000-7.050
Sudden emergency . . . 7.000
Willful and wanton conduct, definition of . . . 4.040

**NO LEASH ORDINANCE**
Animals . . . 29.020

**NOMINAL DAMAGES**
Contracts . . . 45.520

**NON-BUSINESS JOINT VENTURE**
Definition of . . . 8.130

**NOTICE OR KNOWLEDGE**
Animals, dangerous propensities of . . . 29.010
Insurance
Agent's knowledge as binding insurer . . . 47.070
Issuing policy with knowledge of breach . . . 47.170
Reasonable time for notice to insurer . . . 47.200
Municipality's duty to repair or warn upon notice of defect . . . 32.040
Products liability, notice of breach of warranty . . . 34.010

**NUISANCE**
Definitions . . . 26.000; 26.020
Measure of damages . . . 26.030; 26.040
Multiple causes . . . 26.010
Permanent nuisance . . . 26.020; 26.030
Statute of limitations . . . 26.020
Temporary nuisance, measure of damages . . . 26.040

## O

**OBSTRUCTIONS OR OBSTACLES**
Motor vehicles . . . 10.330; 14.020
Railroads
Crossings . . . 18.191; 18.192
Object on tracks . . . 19.010

**OBVIOUS UNFITNESS**
Products liability . . . 34.110-34.130

**OFFER**
Contracts . . . 45.020

**OPINION OR BELIEF**
Expert witnesses (See EXPERT WITNESSES)

**OPINION OR BELIEF**—Cont.
Fraud . . . 39.060

**ORAL CONTRACTS AND BINDERS**
Insurance . . . 47.100

**ORDINARY CARE**
Contributory negligence . . . 6.060
Motor vehicles . . . 10.010

**ORDINARY MEANING OF WORDS**
Construction and interpretation . . . 45.305

**OVERTAKING AND PASSING MOTOR VEHICLES**
Clearance . . . 10.180
Visibility . . . 10.170

**OWNERS AND OCCUPANTS**
Children, occupant's duty to . . . 23.080
Dangerous substances on premises, responsibility for . . . 23.120
Fire fighters, occupant's duty to . . . 23.130
Foreign objects, removal of . . . 23.050
Ice and snow, duty to remove . . . 23.110
Invitees
Definition of . . . 23.020
Exceeding scope of invitation . . . 23.100
Occupant's duty to . . . 23.040; 23.050
Safe condition of premises, right to assume . . . 23.030
Licensees
Bare licensee
Definition of . . . 23.015
Occupant's duty to trespasser and bare licensee . . . 23.090
Definition of
Generally . . . 23.010
Bare licensee . . . 23.015
Occupant's duty to . . . 23.060; 23.070
Trespassers (See subhead: Trespassers)
Police officers, occupant's duty to . . . 23.130
Safe condition of premises, right to assume . . . 23.030
Snow and ice, duty to remove . . . 23.110
Social guest
Definition of . . . 23.010
Occupant's duty to . . . 23.060; 23.070
Trespassers
Definition of . . . 23.000
Occupant's duty to trespasser and bare licensee . . . 23.090

**OWN TESTIMONY**
General instructions, party bound by own testimony . . . 2.060

## P

**PARTIAL LOSS**
Cost of repairs measure of damages . . . 9.060
Property damage . . . 9.060

**PARTNERS AND PARTNERSHIPS**
Liability of . . . 8.150

[References are to Instruction Numbers.]

**PASSENGERS**
Motor vehicles, duties of passengers . . . 13.000; 13.010

**PAST ACT**
Consideration for contract . . . 45.140

**PEDESTRIANS**
Crossing highway or street . . . 14.040
Don't walk signals . . . 14.050
General duties of . . . 14.000
Intersection or crossing, duty at . . . 14.030
Obstruction, stepping from behind . . . 14.020
Traveling along highway, duties of pedestrians . . . 14.010

**PENALTY OR FORFEITURE**
Insurance, estoppel to assert forfeiture . . . 47.160
Motor vehicles, forfeiture of right of way . . . 10.295

**PEREMPTORY INSTRUCTION**
Generally . . . 2.190

**PERMANENT NUISANCE**
Definition of . . . 26.020
Measure of damages . . . 26.030

**PERMANENT TOTAL DISABILITY**
Accident and sickness insurance . . . 47.520

**PERMISSIVE USE OMNIBUS CLAUSE**
Liability insurance . . . 47.700

**PERSONAL INJURY**
General personal injury and property damage instruction . . . 9.000

**PHYSICIAN**
Aggravation of injuries by . . . 9.040

**POLICE OFFICERS**
Occupant's duty to . . . 23.130

**PRE-EXISTING CONDITIONS**
Accident and sickness insurance coverage . . . 47.550
Damages, aggravation of pre-existing condition . . . 9.030; 9.040; 21.015
Life insurance . . . 47.820

**PRELIMINARY INSTRUCTIONS TO JURY**
Generally . . . 2.000

**PRESENT VALUE**
Federal Employers' Liability Act . . . 21.060

**PRESUMPTIONS**
Contributory negligence . . . 6.060
Motor vehicles . . . 10.010
Scope of employment . . . 8.030
Trespass, presumption of willfulness . . . 27.020
Will contests . . . 48.055

**PREVENTING PERFORMANCE**
Contracts . . . 45.440

**PRINCIPAL AND AGENT** (See AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS)

**PRIOR CONVICTIONS**
General instructions . . . 2.140

**PRIOR INCONSISTENT STATEMENTS**
General instructions . . . 2.130; 2.135

**PRIOR LEGAL DUTY**
Consideration for contract . . . 45.130

**PRIVILEGE**
Defamation . . . 37.050

**PROBABLE CAUSE**
False imprisonment . . . 38.045
Malicious prosecution . . . 41.040-41.080

**PROCURING CAUSE**
Brokers . . . 43.020-43.040

**PRODUCTS LIABILITY**
Advertisement, express warranty by . . . 34.030
Allergic users, merchantability . . . 34.080
Breach of warranty by seller or manufacturer . . . 34.075
Description, express warranty by . . . 34.030
Design and construction, manufacturer's duty . . . 34.140
Express warranties . . . 34.020; 34.030
Fitness for a particular purpose, warranty of . . . 34.040; 34.050
Food products, implied warranty of wholesomeness . . . 34.090
Implied warranties . . . 34.040-34.070; 34.090
Inspection duty . . . 34.170
Labeling, merchantability . . . 34.070
Manufacturer's duty . . . 34.140-34.155
Medications, warning duty . . . 34.155
Merchantability, warranty of . . . 34.060; 34.070; 34.080
Misuse of product . . . 34.100; 34.200
Motor Vehicle Warranty Enforcement Act . . . 34.300-34.320
Negligence per se . . . 34.180
Notice of breach of warranty . . . 34.010
Obvious unfitness . . . 34.110-34.130
Ordinary use, unfit for purpose for . . . 34.080
Sample, express warranty by . . . 34.030
Testing duty . . . 34.170
Unintended use . . . 34.100; 34.200
Unreasonably dangerous product
  Allergic users . . . 34.080
  Definition . . . 34.076
Unsafe use of product . . . 34.190
Warning duty . . . 34.150; 34.155
Warranties
  Advertisement, express warranty by . . . 34.030
  Allergic users, merchantability . . . 34.080
  Breach of warranty by seller or manufacturer . . . 34.075
  Definitions . . . 34.000; 34.320
  Description, express warranty by . . . 34.030
  Express warranties . . . 34.020; 34.030

[References are to Instruction Numbers.]

**PRODUCTS LIABILITY**—Cont.
Warranties—Cont.
Fitness for a particular purpose . . . 34.040; 34.050
Food products, implied warranty of wholesomeness . . . 34.090
Implied warranties . . . 34.040-34.070; 34.090
Labeling, merchantability . . . 34.070
Merchantability . . . 34.060; 34.070; 34.080
Motor Vehicle Warranty Enforcement Act . . . 34.300-34.320
Notice of breach . . . 34.010
Sample, express warranty by . . . 34.030

**PROFESSIONAL LIABILITY**
Architects, duty of . . . 35.200
Consent
Termination of services by . . . 35.030
Treatment without . . . 35.070-35.090
Construction contract, implied warranty in . . . 35.300
Duration of duty of care . . . 35.020; 35.030
Emergencies, lack of consent in . . . 35.090
Expert testimony; proof of standard of care . . . 35.050
Good Samaritans . . . 35.120
Health care providers
Aggravation of injuries by . . . 9.040
Local or statewide standard of care for . . . 35.010
Statewide standard of care for . . . 35.000
Hospitals, duty of . . . 35.130
Implied warranty, construction contract and . . . 35.300
Local or statewide standard of care for health care providers . . . 35.010
Malpractice review panel, opinion of . . . 35.060
Mitigation of damages, patient's duty as to . . . 35.110
Municipal corporations, general liability for . . . Ch. 31
Operating room, surgeon's responsibility in . . . 35.100
Operation without informed consent . . . 35.080
Statewide or local standard of care for health care providers . . . 35.010
Statewide standard of care for health care providers . . . 35.000
Termination of services . . . 35.030
Unsuccessful outcome not proof of negligence . . . 35.040

**PROJECTION OF LOAD**
Motor vehicles . . . 17.080

**PROMPT ACTION**
Fraud, duty to take prompt action . . . 39.045

**PROOF** (See EVIDENCE)

**PROOF OF LOSS**
Insurance . . . 47.180; 47.190

**PROPENSITIES OF BREED**
Animal owner charged with knowledge of . . . 29.010

**PROPERTY DAMAGE**
Cost of repairs measure of damages . . . 9.060
Diminution in value measure of damages . . . 9.050
Disputed loss, partial but . . . 9.070
General instruction . . . 9.000
Measure of damages
Cost of repairs . . . 9.060

**PROPERTY DAMAGE**—Cont.
Measure of damages—Cont.
Diminution in value . . . 9.050
Disputed loss, partial but . . . 9.070
Partial loss . . . 9.060
Total loss . . . 9.050

**PROXIMATE CAUSE**
Definitions . . . 5.000; 5.010
Federal Employers' Liability Act . . . 21.010
Multiple proximate causes of injury or death . . . 5.005
Superseding cause, definition of . . . 5.010

**PUNITIVE DAMAGES**
Defamation . . . 37.110; 37.111
Definition of common law actual malice . . . 9.090
General instruction . . . 9.080
Malice, definition of . . . 9.090
Malicious prosecution . . . 41.150
Motor vehicles, intoxicated drivers . . . 15.005
Wrongful act, death by . . . 9.105

## Q

**QUANTUM MERUIT**
Attorney and client . . . 42.060
Contracts . . . 45.570

**"QUOTIENT" AWARDS**
Eminent domain . . . 46.130

## R

**RAILROADS**
Anticipated trespassers on tracks . . . 19.020
Barriers at crossings . . . 18.070
Bell, railroad's duty to sound . . . 18.080
Causation . . . 21.010
Comparative negligence . . . 18.090
Contributory negligence . . . 21.030
Crossings
Barrier at . . . 18.070
Bell, railroad's duty to sound . . . 18.080
Comparative negligence . . . 18.090
Duty to sound warnings . . . 18.090
Explosives, duties of drivers carrying . . . 18.060
Hired vehicle drivers, duties of . . . 18.060
Horn, railroad's duty to sound . . . 18.080; 18.081
Inflammables, duties of drivers carrying . . . 18.060
Look and listen duty of driver, generally . . . 18.000-18.030
Lookout duty of railroad . . . 18.130
Obstructions or obstacles . . . 18.191; 18.192
Positive and negative testimony . . . 18.110
Removing vehicle from tracks, driver's duty . . . 18.040
Repair duty of railroad . . . 18.200
School bus drivers, duties of . . . 18.060
Speed of train . . . 18.050; 18.140; 18.150
Stopping, driver's duty as to . . . 18.050
Trees and brush, duty to remove . . . 18.190
Warnings and warning devices . . . 18.080-18.100; 18.160; 18.170; 18.180

[References are to Instruction Numbers.]

**RAILROADS**—Cont.
Crossings—Cont.
Whistle, railroad's duty to sound . . . 18.080
Duty to sound warnings . . . 18.090
Employee of consignee, duty of carrier to . . . 20.000
Explosives, duties of drivers carrying . . . 18.060
Federal Employers' Liability Act
Causation . . . 21.010
Contributory negligence . . . 21.030
Degree of care varies with risk level . . . 21.001
Duty of care . . . 21.000
Employee's duty of care . . . 21.020
Federal Safety Appliance Act . . . 21.040
Pre-existing condition, aggravation of . . . 21.015
Present value . . . 21.060
Railroad's duty of care . . . 21.000
Federal Railroad Safety Authorization Act violation . . . 21.040
Federal Safety Appliance Act . . . 21.040
Fires started by train, liability for . . . 20.010
Hired vehicle drivers, duties of . . . 18.060
Horn, railroad's duty to sound . . . 18.080; 18.081
Inflammables, duties of drivers carrying . . . 18.060
Look and listen duty of driver, generally . . . 18.000-18.030
Lookout duty of railroad . . . 18.130
Object on tracks . . . 19.010
Obstructions or obstacles . . . 18.191; 18.192
Present value, Federal Employers' Liability Act . . . 21.060
Removing vehicle from tracks, driver's duty . . . 18.040
Repair duty of railroad . . . 18.200
Right of way, generally . . . 19.000-19.020
School bus drivers, duties of . . . 18.060
Stopping, driver's duty as to . . . 18.050
Trees and brush, duty to remove . . . 18.190
Trespassers . . . 19.000; 19.020
Warnings and warning devices . . . 18.080-18.100; 18.160; 18.170; 18.180
Whistle, railroad's duty to sound . . . 18.080

**RATIFICATION**
Attorney and client . . . 42.040
Insurance agents . . . 47.060

**READY, WILLING, AND ABLE**
Brokers . . . 43.050

**REAR END COLLISION**
Finding instructions . . . 10.005

**REASONABLE PROOF**
Damages . . . 9.010

**REASONABLE TIME**
Insurer, notice to . . . 47.200

**RED LIGHTS**
Motor vehicles . . . 10.262; 10.268

**REJECTED OR STRICKEN EVIDENCE**
General instructions . . . 2.170

**RELIANCE**
Fraud, definition of reliance . . . 39.030

**RENEWALS**
Insurance policies . . . 47.125

**REPAIRS**
Failure to exercise reasonable care in making repairs, burden of proving landlord's . . . 24.025
Landlord and tenant . . . 24.020; 24.025
Railroad crossings . . . 18.200

**REPORTS**
Eminent domain . . . 46.180

**RESCISSION**
Compromise and settlement . . . 44.020
Contracts, generally . . . 45.430

**RESCUE**
Special negligence doctrines . . . 7.020

**RESIDUE**
Eminent domain . . . 46.010-46.030

**RES IPSA LOQUITUR**
Negligence . . . 7.050

**RESISTING ARREST**
Assault and battery . . . 36.040

**REVIVAL**
Will contests . . . 48.060

**REVOCATION**
Will contests . . . 48.050; 48.055

**RIGHT OF WAY**
Motor vehicles
Forfeiture, unlawful speed . . . 10.295
Stopping and yielding . . . 10.300
Traffic circles . . . 10.310
Railroads . . . 19.000-19.020

**RIGHT SIDE OF ROAD**
Duty to drive on . . . 10.110

**RIGHT TURNS**
Motor vehicles . . . 10.230

## S

**SAMPLE, EXPRESS WARRANTY BY**
Generally . . . 34.030

**SCHOOL BUSES**
Approaching drivers, duties of . . . 12.040-12.070
Picking up or discharging students, duty as to . . . 12.000; 12.010; 12.030
Railroad crossings . . . 18.060
Warning device, duty as to . . . 12.000; 12.010

**SCOPE OF EMPLOYMENT** (See AGENCY, EMPLOYMENT, AND SIMILAR RELATIONSHIPS)

**SELF-DEFENSE**
Assault and battery . . . 36.020

[References are to Instruction Numbers.]

**SELLING OF MERCHANDISE**
Motor vehicles stopping on highway . . . 10.340

**SETTLEMENT**
Accord and satisfaction . . . 44.015
Contractual settlements . . . 44.000
Evidence of liability, compromise negotiations as . . . 44.030
Fraud, rescission of agreement for . . . 44.020
Liability insurance . . . 47.710
Rescission of agreement . . . 44.020
Statutory accord and satisfaction . . . 44.015

**SEVEN TO THIRTEEN YEARS OF AGE, CHILDREN BETWEEN**
Contributory negligence . . . 6.020

**SEVEN YEARS OF AGE**
Contributory negligence of minors under . . . 6.005

**SEVERANCE**
Trespass, severance of goods from land . . . 27.040

**SEXUALLY VIOLENT PREDATORS, CIVIL COMMITMENT OF**
Definitions . . . 49.200; 49.300
Expert opinion . . . 49.400
Finding instruction . . . 49.000
Jury's determination . . . 49.400
"Mental abnormality" defined . . . 49.300
"Personality disorder" defined . . . 49.300
"Sexually violent offense" defined . . . 49.200
Standard of proof . . . 49.100

**SHOPLIFTING**
False imprisonment . . . 38.040; 38.045
Malicious prosecution . . . 41.070

**SIDEWALKS**
Municipal corporations, liability of (See MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES)

**SIGNALS AND SIGNALING**
Motor vehicles . . . 10.190-10.210
Pedestrians, don't walk signals . . . 14.050

**SINGLE INDIVISIBLE INJURY**
Negligence . . . 4.025

**SKIDDING**
Motor vehicles . . . 10.040

**SLEEP**
Motor vehicles . . . 10.060

**SLOW DRIVING**
Motor vehicles . . . 10.100; 10.120

**SNOW AND ICE, DUTY TO REMOVE**
Landlord and tenant . . . 24.030
Owners and occupants . . . 23.110

**SOCIAL GUEST**
Definition of . . . 23.010
Occupant's duty to . . . 23.060; 23.070

**SOVEREIGN IMMUNITY**
Emergency vehicles . . . 11.000-11.020

**SPECIAL NEGLIGENCE DOCTRINES**
Generally . . . 7.000-7.050

**SPECULATION**
Verdict not to show be based on . . . 2.220

**SPEED**
Motor vehicles
- Driving too slowly . . . 10.100
- Emergency vehicles
  - Sovereign immunity . . . 11.010
  - Stationary emergency vehicle, approaching . . . 11.035
- Exceeding posted limit . . . 10.080
- Forfeiture of right of way, unlawful speed . . . 10.295
- Minimum speed . . . 10.090
- Operation, generally . . . 10.000
- Slow driving . . . 10.100
- Stopping distances . . . 10.105
- Table of speed and stopping distances . . . 10.105

Train speeds at railroad crossings . . . 18.050; 18.140; 18.150

**STANDARD OF CARE**
Attorney and client . . . 42.010
Emergency vehicles . . . 11.000; 11.005
Professional liability, expert testimony and . . . 35.050

**STANDARD OF PROOF**
Evidence . . . 3.100; 3.110

**STATUTORY ACCORD AND SATISFACTION**
Compromise and settlement . . . 44.015

**STEADY RED LIGHT**
Motor vehicles . . . 10.262; 10.268

**STIPULATED ELEMENTS**
Malicious prosecution . . . 41.110

**STOP AND STOPPING**
Accident, stopping because of . . . 10.350
Driver's duty not to stop on highway . . . 10.320
Railroad crossings . . . 18.050
Right of way, stopping and yielding . . . 10.300
Selling of merchandise, stopping for purpose of . . . 10.340
Signaling by driver, duty as to . . . 10.190; 10.200
Speed, stopping distances . . . 10.105
Stop sign or signal . . . 10.200; 10.270

**STREETS AND HIGHWAYS**
Eminent domain, highway condemnation . . . 46.150
Municipal corporations, liability of (See MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS AND BRIDGES)

**STRICT LIABILITY**
Blasting damage from explosives . . . 30.010

**STRIKING EVIDENCE**
General instructions . . . 2.170; 2.210

[References are to Instruction Numbers.]

**SUDDEN EMERGENCY**
Special negligence doctrines . . . 7.000

**SUICIDE**
Insurance . . . 47.810

**SUPERSEDING CAUSE**
Definition of . . . 5.010

**SURGICAL OPERATIONS**
Informed consent, operation without . . . 35.080
Professional liability in operating room . . . 35.100

**SURRENDERING CONTROL**
Landlord's duty upon . . . 24.000

**SYMPATHY**
Verdict not to be based on . . . 2.220

## T

**TAILGATING**
Duty of driver in following another vehicle . . . 10.004

**TAIL LIGHTS**
Motor vehicles . . . 17.010

**TEMPORARY NUISANCE**
Measure of damages . . . 26.040

**TERMINATION**
Passenger-carrier relationship . . . 22.060
Professional liability, termination of services . . . 35.030

**TESTAMENTARY MATTERS** (See WILL CONTESTS)

**TESTING DUTY**
Products liability . . . 34.170

**THIRD PARTIES**
Attorney and client . . . 42.030
Contracts . . . 45.005; 45.610

**THREE LANE ROADS**
Motor vehicles . . . 10.150

**TIME OR DATE**
Contracts, time for acceptance . . . 45.050; 45.060
Eminent domain, determination of just compensation . . . 46.040
Insurer, notice to . . . 47.200

**TOTAL LOSS**
Damages . . . 9.050
Diminution in value measure of damages . . . 9.050

**TRAFFIC**
Motor vehicles (See MOTOR VEHICLES)

**TRAFFIC CIRCLES**
Right of way . . . 10.310

**TRAFFIC REGULATIONS**
Emergency vehicles . . . 11.020

**TRAFFIC SIGNALS AND SIGNALING**
Motor vehicles . . . 10.190-10.210

**TRAFFIC SIGNALS AND SIGNALING**—Cont.
Pedestrians, don't walk signals . . . 14.050

**TREES AND BRUSH**
Railroad crossings . . . 18.190

**TRESPASS AND TRESPASSERS**
Damages . . . 27.040
Definitions . . . 23.000; 27.000
Duty to trespasser and bare licensee . . . 23.090
Presumption of willfulness . . . 27.020
Railroads . . . 19.000; 19.020
Severance of goods from land, damages . . . 27.040
Willful or not willful . . . 27.010

**TURNS AND TURNING VEHICLES**
Left turns . . . 10.240-10.260
Right turns . . . 10.230
Signals . . . 10.200
Yielding right of way . . . 10.240

## U

**UNCONTROLLED INTERSECTION**
Yielding right of way . . . 10.290

**UNDUE INFLUENCE**
Contracts . . . 45.460
Will contests . . . 48.070

**UNEXPLAINED FAILURE TO PRODUCE WITNESS**
General instructions . . . 2.080

**UNIFORM COMMERCIAL CODE (UCC)**
Compromise and settlement . . . 44.010

**UNINSURED MOTORISTS**
Motor vehicles . . . 16.000; 16.010

**UNINTENDED USE**
Products liability . . . 34.100; 34.200

**UNSAFE USE OF PRODUCT**
Products liability . . . 34.190

**USE OF PRODUCT**
Products liability . . . 34.080; 34.100; 34.190; 34.200

**USE OF PROPERTY**
Eminent domain . . . 46.060

## V

**VERDICT**
"Allen Charge" . . . 2.250
Estate, verdict against . . . 2.240
Jury (See JURY)
Sympathy, bias, guesswork or speculation, verdict not to be based on . . . 2.220

**VIEW BY JURY**
General instructions . . . 2.090

**VISIBILITY**
Overtaking and passing motor vehicles . . . 10.170

[References are to Instruction Numbers.]

## W

**WAIVER AND ESTOPPEL**
Contracts . . . 45.410
Insurance . . . 47.150; 47.160; 47.180

**WARNINGS AND WARNING DEVICES**
Motor vehicles
Duty to set out warning devices . . . 10.360
Passengers' duties . . . 13.000
School buses . . . 12.000; 12.010
Municipality's duty to warn of obstruction . . . 32.010
Products liability . . . 34.150; 34.155
Railroad crossings . . . 18.080-18.100; 18.160; 18.170; 18.180

**WARRANTIES**
Advertisement, express warranty by . . . 34.030
Allergic users, merchantability . . . 34.080
Breach of warranty by seller or manufacturer . . . 34.075
Construction contract, implied warranty in . . . 35.300
Definitions . . . 34.000; 34.320
Description, express warranty by . . . 34.030
Express warranties . . . 34.020; 34.030
Fitness for a particular purpose . . . 34.040; 34.050
Food products, implied warranty of wholesomeness . . . 34.090
Implied warranties . . . 34.040-34.070; 34.090; 35.300
Labeling, merchantability . . . 34.070
Merchantability . . . 34.060; 34.070; 34.080
Motor Vehicle Warranty Enforcement Act . . . 34.300-34.320
Notice of breach . . . 34.010
Ordinary use, unfit for purpose for . . . 34.080
Products liability (See PRODUCTS LIABILITY)
Sample, express warranty by . . . 34.030

**WASTE**
Double damages . . . 24.050
Tenant's liability for, generally . . . 24.040

**WEIGHT OF EVIDENCE**
Generally . . . 3.100; 46.110

**WHISTLES**
Railroad crossings . . . 18.080

**WILD ANIMALS**
Contributory negligence . . . 29.040
Owner's duty . . . 29.030

**WILL CONTESTS**
Burden of proof . . . 48.000
Capacity . . . 48.040
Definition of will . . . 48.010
Execution of will . . . 48.020

**WILL CONTESTS**—Cont.
Finding instructions . . . 48.090
Intent . . . 48.030
Issues . . . 48.000
Presumption of revocation . . . 48.055
Revival . . . 48.060
Revocation . . . 48.050; 48.055
Undue influence . . . 48.070

**WILLFUL AND WILLFULNESS**
False imprisonment . . . 38.040
Malicious prosecution . . . 41.070
Negligence . . . 4.040
Trespass . . . 27.010

**WINDOWS**
Motor vehicles, lookout duty . . . 10.025

**WINDSHIELD WIPERS**
Motor vehicles . . . 17.060

**WITHDRAWING OFFER**
Contracts . . . 45.110

**WITNESSES**
General instructions
Adverse witness . . . 2.030
Credibility . . . 2.020
Expert witnesses . . . 2.040
Prior inconsistent statements . . . 2.130
Unexplained failure to produce . . . 2.080

**WRONGFUL DEATH ACTIONS**
Damages . . . 9.100; 9.105

**WRONGFUL DISCHARGE**
Attorney and client . . . 42.060

**WRONGFUL OR TORTIOUS INTERFERENCE**
Business relationship (See INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP, WRONGFUL OR TORTIOUS)
Contracts (See CONTRACTS, subhead: Interference, wrongful or tortious)

## Y

**YIELDING RIGHT OF WAY**
Motor vehicles
Emergency vehicles
Generally . . . 11.030
Stationary emergency vehicle, approaching . . . 11.035
Operation of vehicles, generally . . . 10.300
Signs at intersections . . . 10.270; 10.280
Turns and turning . . . 10.240
Uncontrolled intersections . . . 10.290

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